LIFTING OF MORATORIUM ON ESA LISTINGS

BEFORE THE

COMMITTEE ON RESOURCES
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

LIFTING OF THE MORATORIUM ON LISTING OF THREATENED OR ENDANGERED SPECIES UNDER THE ENDANGERED SPECIES ACT WHICH WAS IMPOSED IN APRIL, 1995, OF ESA; AND THE NEED FOR A COMPREHENSIVE REFORM

JUNE 25, 1996—WASHINGTON, DC

Serial No. 104–89

Printed for the use of the Committee on Resources

U.S. GOVERNMENT PRINTING OFFICE

26–566cc WASHINGTON : 1996

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-053605-7

LIFTING OF MORATORIUM ON ESA LISTINGS

BEFORE THE

COMMITTEE ON RESOURCES
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

LIFTING OF THE MORATORIUM ON LISTING OF THREATENED OR ENDANGERED SPECIES UNDER THE ENDANGERED SPECIES ACT WHICH WAS IMPOSED IN APRIL, 1995, OF ESA; AND THE NEED FOR A COMPREHENSIVE REFORM

JUNE 25, 1996—WASHINGTON, DC

Serial No. 104–89

Printed for the use of the Committee on Resources

U.S. GOVERNMENT PRINTING OFFICE

26–566cc WASHINGTON : 1996

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-053605-7

COMMITTEE ON RESOURCES

DON YOUNG, Alaska, *Chairman*

W.J. (BILLY) TAUZIN, Louisiana
JAMES V. HANSEN, Utah
JIM SAXTON, New Jersey
ELTON GALLEGLY, California
JOHN J. DUNCAN, JR., Tennessee
JOEL HEFLEY, Colorado
JOHN T. DOOLITTLE, California
WAYNE ALLARD, Colorado
WAYNE T. GILCHREST, Maryland
KEN CALVERT, California
RICHARD W. POMBO, California
PETER G. TORKILDSEN, Massachusetts
J.D. HAYWORTH, Arizona
FRANK A. CREMEANS, Ohio
BARBARA CUBIN, Wyoming
WES COOLEY, Oregon
HELEN CHENOWETH, Idaho
LINDA SMITH, Washington
GEORGE P. RADANOVICH, California
WALTER B. JONES, JR., North Carolina
WILLIAM M. (MAC) THORNBERRY, Texas
RICHARD (DOC) HASTINGS, Washington
JACK METCALF, Washington
JAMES B. LONGLEY, JR., Maine
JOHN B. SHADEGG, Arizona
JOHN E. ENSIGN, Nevada

GEORGE MILLER, California
EDWARD J. MARKEY, Massachusetts
NICK J. RAHALL II, West Virginia
BRUCE F. VENTO, Minnesota
DALE E. KILDEE, Michigan
PAT WILLIAMS, Montana
SAM GEJDENSON, Connecticut
BILL RICHARDSON, New Mexico
PETER A. DEFAZIO, Oregon
ENI F.H. FALEOMAVAEGA, American Samoa
TIM JOHNSON, South Dakota
NEIL ABERCROMBIE, Hawaii
GERRY E. STUDDS, Massachusetts
SOLOMON P. ORTIZ, Texas
OWEN B. PICKETT, Virginia
FRANK PALLONE, JR., New Jersey
CALVIN M. DOOLEY, California
CARLOS A. ROMERO-BARCELÓ, Puerto Rico
MAURICE D. HINCHEY, New York
ROBERT A. UNDERWOOD, Guam
SAM FARR, California
PATRICK J. KENNEDY, Rhode Island

DANIEL VAL KISH, *Chief of Staff*
DAVID DYE, *Chief Counsel*
CHRISTINE KENNEDY, *Chief Clerk/Administrator*
JOHN LAWRENCE, *Democratic Staff Director*

CONTENTS

LIFTING OF MORATORIUM ON ESA LISTINGS

TUESDAY, JUNE 25, 1996

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES
Washington, DC.

The Committee met, pursuant to call, at 11:10 a.m., in room 1324, Longworth House Office Building, Hon. Richard Pombo (Acting Chairman of the Committee) presiding.

Mr. POMBO. The Chairman, Mr. Young, is running a little bit late, and we try to keep these on schedule, so we are going to go ahead and get started with our first panel. I would like to ask unanimous consent that the Chairman's opening statement be included here in the record. And without objection it will be done.

[Statements of Mr. Young and Mr. Pombo follow:]

STATEMENT OF HON. DON YOUNG, A U.S. REPRESENTATIVE FROM ALASKA, AND CHAIRMAN, COMMITTEE ON RESOURCES

Good morning. I want to welcome all of you to this oversight hearing on the resumption of the listing process under the Endangered Species Act.

As many of you know in April, 1995, Congress imposed a moratorium on new listings of species under the ESA. This was done with the intent of giving the country a "time out" from listings and the conflicts that frequently accompany listings in order to give Congress time to reform the ESA.

George Frampton, Assistant Secretary for Fish, Wildlife and Parks, admitted in testimony before this Committee that there are problems with the ESA that Congress needs to address.

Over the last year and one half this Committee has built a substantial record for the need for a comprehensive reform of ESA.

The Committee has held more than thirteen hearings on the need for common sense ESA reforms.

In each of these hearings we have heard testimony of loss of private property, failure to recover endangered species, thousands of lost jobs, broken families, heavy unfunded mandates on local governments.

This Act is not working as those of us who voted for it back in 1973 intended it to work.

However, the Administration still has not sent us a bill to fix the problems that they have publicly admitted exist.

Those of us who have voted for the ESA in the past are disappointed that the Act has been used, not to protect endangered and threatened species, but to allow the Federal Government to expand its power and control over the lives and property of individual citizens.

I want to see the ESA used to conserve and protect those plants and animals that most need its protection, but I do not want it misused to take away the freedom, dignity, and self reliance of our citizens.

I believe that the moratorium gave Congress a chance to take a hard look at the implementation of the Act.

During the moratorium the Fish and Wildlife Service finally began issuing Section 10 permits and developing recovery plans for those species already listed.

The moratorium gave our citizens an opportunity to take out time for much needed debate on how best to proceed to reform the Act.

Now that listings have resumed, my concern is that good science be used to support any listing, that the public be allowed to fully participate in the process, that our states and local governments are made full partners in the process, and that we insure that private property rights are respected.

It is unfortunate that the mere rumor that a species might be listed strikes fear in the hearts of many local citizens.

If the listing of species did not result in such punitive restrictions or loss of jobs and economic opportunity, then all of us could contribute more to species protection.

We should stop blaming and begin looking for solutions to these problems.

The best way to insure successful and effective wildlife protection programs is to put people back into the environmental equation and to rely on our natural human desire to protect and insure our natural heritage.

STATEMENT OF HON. RICHARD W. POMBO, A U.S. REPRESENTATIVE FROM CALIFORNIA

Thank you, Mr. Chairman, for holding this very important hearing on the resumption of the listing process following President Clinton's decision to lift the moratorium on new listings under the Endangered Species Act. As with the previous thirteen hearings held in this Committee—including those that took place outside of Washington, D.C.—I sincerely appreciate your commitment to the reauthorization of the ESA, one of our most important Federal wildlife statutes.

As you are aware, Mr. Chairman, Congress passed—and the President signed—a moratorium on new listings in April of 1995. This moratorium was intended to put the brakes on any new listings of endangered or threatened species until we replaced the existing law with an updated and upgraded reform measure. One year later, in April, 1996, the President lifted the moratorium using the authority provided to him in the final FY 1996 budget for the Interior Department.

Shortly after that, the Administration promulgated regulations establishing a priority system for deciding which species to propose for listing. In their prioritization of so-called listing activities, the U.S. Fish and Wildlife Service has placed any and all delisting activities at the bottom of the barrel. This means that despite any evidence to the contrary, species that are candidates for delisting will not even be evaluated for the remainder of the fiscal year, even if there is significant evidence to show that a species should no longer be listed. Under this plan, private property owners can expect no regulatory relief, while they retain the privilege of protecting an endangered species that probably isn't even endangered.

The listing process, along with many other components of the existing ESA, are simply not working. The law is conflict-ridden and problematic. Many of the species are often not endangered and most do not have a recovery plan. Even the species that do have a recovery plan have shown little improvement. Furthermore, when the public is forced to protect a species not widely considered endangered, they begin to lose confidence in the entire statute—and in those implementing it. This is not good for the species, and not good for the people who are charged with protecting them.

The result is that people who live day to day with the Endangered Species Act have grown to fear it. The phrase "shoot, shovel, and shut up" was not created by some public relations firm on Wall Street. It is a product of the collective fears of farmers and ranchers and other private property owners all across the country when they discover an endangered species on their property.

The listing process is but one aspect of the Endangered Species Act that needs to be reformed. If the public is going to devote their time and resources to the protection of an endangered species, they have a right to expect that it be endangered. The current law—and the current administration of the law—doesn't place a value on sound science. Furthermore, the public has very little input in the decision-making process. Even State and local governments are practically shut out of the process. I can think of no better way to remove the incentive to protect species than by making listing decisions behind closed doors, with little or no input from State and local governments, using highly politicized "junk" science. The ESA does all of this, and more.

Mr. Chairman, it is our responsibility to adapt and refine laws to ensure that they achieve their laudable goals through proper administration. Clearly, this is not currently happening. For that I applaud your leadership not only for your continued interest in ESA reform, but for your willingness to hold oversight hearings so that we can get to the bottom of this important piece of the ESA puzzle. Remember, we all want an ESA that works, one that enables private landowners and their government to cooperate to make it work. I look forward to hearing the testimony of all of today's witnesses.

Mr. POMBO. And if he shows up, he can say whatever he wants when he gets here. He usually does.

OK, we are going to go ahead and get started. I know that the first panel is already seated. At this point I would like to turn to Mr. Thornberry, who has requested to introduce one of his constituents. Mr. Thornberry.

STATEMENT OF MAC THORNBERRY, A U.S. REPRESENTATIVE FROM TEXAS

Mr. THORNBERRY. Thank you, Mr. Chairman, and it is certainly a pleasure for me to welcome one of our first witnesses today. State Senator Teel Bivins has been a member of the Texas State Senate since 1988. In a body which is controlled by the Democratic Party, he chairs a Nominations Committee and is also on the Natural Resources Committee in the State.

He is very familiar with the Endangered Species Act, how it affects the State in general, but particularly how these proposed listings may affect our neck of the woods. And the thing that I think he brings as much as anything else is not only a perspective of this as a legislator, but it also affects him personally. He makes his living off the land. He has been involved in cattle ranching and other things in the Texas Panhandle, his family has for a number of years. So I appreciate very much the opportunity for him to come and testify from his perspectives, and particularly on the moratorium and how its lifting could affect us in one of the most agriculturally rich parts of the country.

Thank you.

Mr. POMBO. Thank you. We also have on our first panel Mr. John Rogers. He is the Acting Director of the U.S. Fish and Wildlife Service, and we would like to welcome you here today. And Mr. Rolland Schmitten, who has has testified before the Task Force on ESA in the past and testified before this Committee in the past. He is the Assistant Administrator for Fisheries, National Oceanographic and Atmospheric Administration, Department of Commerce in Washington, D.C.

Welcome, and we will start with Senator Bivins. Just the ground rules. We have the lights sitting in front of you. If you are not familiar with them, we try to limit the opening statements to five minutes. Green means go. Yellow means hurry up. Red means stop. Your entire statement will be included in the record, but if you could try and limit your oral statement to the five minutes, I would appreciate it.

Senator Bivins, you may begin.

STATEMENT OF SENATOR TEEL BIVINS, TEXAS STATE SENATE

Mr. BIVINS. Thank you, Mr. Chairman, members. I appreciate the opportunity to be here. I have been on your side of the dias far more often than I have been on this side, and I must confess that this is probably good for me. I think that I will listen more carefully when I go back to Austin and hear testimony before the Senate Natural Resources Committee.

I have submitted written testimony, and I know that the most boring thing that you as a member can do is listen to someone read it, so I won't do that. I will, though, begin by including a quote

from my testimony that I read. I think it sort of sums up the overall issue. Stewart Pimm, who is an ecologist at the University of Tennessee wrote, "As ecologists see it, the greatest threat to biodiversity is the success of one species, our own."

I think that really shows the corner that we are painting ourselves into with enforcing the Endangered Species Act in its current form. I was very hopeful that the moratorium would provide us with an opportunity to take a step back and to inject some common sense and some guidelines into this law that I believe now has far outpaced the original intent of the drafters of the Endangered Species Act.

Generally when you look at what has happened, we have listed over 1500 species, but we have only recovered or delisted, like, 26, less than two percent. And with the number of species that are proposed out there, we are going to wind up in an impossible situation, because every species that is listed carries with it restrictions on the ability to use the land where that species exists. And then God forbid critical habitat should be found for that species, which puts even more restrictive restrictions on the ability to use land. So I believe that science is outpacing our ability to do what the framers or the drafters of the Act intended for us to do. So I would hope that this moratorium would allow us some time to revisit that and to redirect it.

I think in general I would commend to you the proposal from Texas Parks and Wildlife and the Texas Agriculture Department that would propose that we refocus the Act toward ecosystems and groups of species as opposed to taking rifle shots at increasingly limited and rare species. Secondly that proposal would encourage the delisting—decoupling, I should say, of this process, allowing U.S. Fish and Wildlife to go ahead and list species but charge the states and groups of states with the duty of crafting recovery plans for these species.

If you retain the current law, I would urge you to change it by injecting minimum scientific standards as criteria for proposed listings that would require in law peer review of the listings. And we recognize that some species are just plain rare, and that is what God intended them to be, and we don't need to be spending money trying to make them grow.

And finally, this idea of listing subspecies, I think, is carrying, again, the intent of the original drafters too far. In the past couple of years we have had two species proposed to be listed in the Texas Panhandle, which is the part of Texas that Mac Thornberry and I both represent in our respective bodies, the crown of Texas as we oftentimes call it. One was the Swift fox and the other was the Arkansas River shiner. The Swift fox, fortunately, was not listed because the State, working with five other states, were able to convince Fish and Wildlife that they could do a recovery plan that would be preferable to listing the species.

One of the problems with both of these listings was that the way we found out about them was not from U.S. Fish and Wildlife, but reading about it in the newspaper, which points up a real problem with the law that we have today, and that is the total lack of communication between the Federal Government and State wildlife agencies around the United States.

When both species were listed, and they were at separate times, both times there were shock waves that went through our part of the State. The first reaction is fear on the part of landowners and people that live off the land or indirectly live off the land, which is primarily the industry that is the Texas Panhandle. There is no upside for a landowner when it comes to the listing of a species. There is nothing but downside, and that is why I would encourage in rewriting this Act the use of carrots as opposed to sticks.

Let me close by listing—by sharing with you one of my real concerns about the whole process. The Arkansas River shiner was proposed to be listed, even though there is a thriving population of Arkansas River shiners in the Pecos River in New Mexico. However, that population of shiners was introduced in that river. They were stocked about 25 years ago. And in fact, amazing as it may seem, U.S. Fish and Wildlife is recommending that that group of Arkansas River shiners be eradicated because they are threatening the Red River shiner that exists over in the Pecos River, which is indigenous, and instead at the same time list this critter as an endangered species in the habitat to the east. It is this kind of scientific hair splitting that just doesn't make sense. I challenge even a trained scientist to look at an Arkansas River shiner and a Red River shiner and tell me the difference. I think that is where so many of us get so frustrated with the implementation of this Act.

Again, I applaud you, Mr. Pombo, and your colleague, the Chairman, for your efforts in this regard. And I hope that sooner rather than later we can amend the Endangered Species Act. I will be happy to answer questions.

[Statement of Teel Bivins may be found at end of hearing.]

Mr. POMBO. Thank you. Mr. Rogers, before you begin I just wanted to say that you are now Acting Director, filling in for Mollie Beattie, and our thoughts and prayers go out with Ms. Beattie in the struggle that she is going through right now, but we are glad to have you here. And you may begin.

STATEMENT OF JOHN ROGERS, ACTING DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, ACCOMPANIED BY JOHN LESHY, THE SOLICITOR, DEPARTMENT OF INTERIOR

Mr. ROGERS. I appreciate the opportunity to be here, Mr. Chairman. I would like the record to reflect the deep appreciation those of us in the Fish and Wildlife Service have for the efforts of this Committee and the personal efforts of Chairman Young to name the wilderness area of the Arctic National Wildlife Refuge after Director Beattie. We appreciate it. Her family appreciates it. We in the Service feel her absence. We will miss her and face the immediate challenge of attempting to live up to the standard she has set.

Over the past three years the Service has worked to improve the implementation of the Endangered Species Act in a manner that conserves species, recognizes the rights and concerns of property owners, and achieves the greatest conservation benefits in the most cost-effective manner. The ability of the Service to evaluate the status of imperiled species and to provide protection to them under the Endangered Species Act was greatly curtailed in Fiscal Year 1995 and eliminated from October 1995 through April 1996 because of the moratorium on final listing decisions coupled with a

severe budget cut. Because of that moratorium, the Service is currently facing a backlog of 242 proposed species with another 182 candidates. We must also deal with 11 pending court orders or settlement agreements that require us to take listing actions on numerous species, 25 lawsuits, as well as 90-day petition findings due for 28 species and 12-month petition findings due for 29 species.

In light of the moratorium being lifted and the backlog we face, it became clear that the Fish and Wildlife Service cannot do everything, and it is critical, then, that we develop and follow an orderly plan with identifiable priorities for resuming listing activities. Guidance setting forth a priority system for the Service's listing program was published in the **Federal Register** on May 16, 1996. And I would request that a copy of the guidance be placed in the record.

Mr. POMBO. Without objection.

[The information may be found at end of hearing.]

Mr. ROGERS. The restart of the listing program will be guided by four basic principles. First, highest priority will be given to those species in most need of protection. Second, biological need, not the preference of litigants or others, will drive the listing process. Third, sound science, including peer review, will form the foundation of listing decisions. And fourth, public participation, comment and cooperation of states and other Federal agencies as well as the affected public will be a cornerstone of our activities.

We have thus prioritized our actions as follows. In Tier 1 we will initiate emergency listings if determined to be necessary. In Tier 2 we will process final listing decisions on proposed species. Within Tier 2 highest priority will be placed on species facing imminent and high magnitude threats. Under Tier 3 we will process new proposals for listings, delistings and downlistings. We will also process final decisions on proposed delistings and downlistings as well as administrative findings and critical habitat designations.

The resumption of the listing program not only required that we assign approximately 100 listing staff back into the program, but also required that we review all packages as quickly as possible to determine their priority and currency. However, because the proposed packages are in various states of completeness, the rates at which they move through the process will vary. To ensure the best and most accurate species status, public comment periods may need to be reopened and public hearings may need to be held.

Another issue facing the Service as we restart the listing program is the numerous lawsuits involving petition findings, critical habitat designations and missed statutory deadlines. These lawsuits are diverting considerable resources away from our efforts to conserve species. The listing priority guidance was developed to help the public and the courts understand precisely how we will use our limited listing appropriations for maximum effect.

In closing, I would like to stress to the Committee that the management and policy formation foundations of the ESA are as strong as they have ever been. We have spent the past several years buttressing that foundation with sound science, clear priorities founded in conservation biology, and clear open communication with the public. At this point our ability to deliver further improvements

will be based on the availability of adequate funds and a clear statutory framework.

I will be happy to answer any questions that the Committee might have.

[Statement of John Rogers may be found at end of hearing.]

Mr. POMBO. Thank you. And, Mr. Schmitten.

STATEMENT OF ROLLAND SCHMITTEN, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL OCEANOGRAPHIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

Mr. SCHMITTEN. Thank you, Mr. Chairman. First let me echo the concerns and support for Director Beattie. Not only is she a good colleague, but more importantly she has been a very good friend and I do miss her.

Mr. Chairman, I am Rollie Schmitten, NOAA's Assistant Administrator for Fisheries, and it is a pleasure to be here today to discuss the implementation and administration of the ESA and our procedures to restart the listing process in a rational and scientific manner. I will just summarize my comments.

For the last 23 years, the Secretary of Commerce has been charged with the management of marine fish, all anadromous fish—those are the fish that live in salt water and spawn in fresh—and nearly all marine mammals under the ESA, providing protection and recovery actions for those species that are listed either as threatened or endangered. We are currently responsible for the conservation and recovery of 29 listed species. Most of the marine species that are listed by National Marine Fisheries Service are highly migratory, and managing the recovery of species that travel through multiple jurisdictions, including both local and State, at times tribal, Federal, and international waters, requires an enormous amount of planning, flexibility and coordination, and something that I continue to stress, the ability to collaborate with these parties as partners.

Currently NMFS has 14 expected actions under the ESA. Eleven of those deal with anadromous fish. Currently we have no emergency listings proposed. There are two actions pending to reclassify species from threatened to endangered status. Those include one action relating to the summer, spring and fall chinook salmon, as well as an action relating to the western group of Stellar sea lions. We also have a pending action to delist the shortnose sturgeon in the Kennebec River in Maine, which will be done in July.

As Senator Bivins suggested, good science is absolutely essential to these proposals for listing. We now incorporate independent science review, peer review in the listing and recovery activities to assure the quality of the information and will, and I stress will, submit all listing decisions to peer review by an outside independent group of three experts. We strongly support a collaborative process when conducting a listing review, as the agency has come to realize that often the valuable information or the data rests with other entities. And that is especially true for salmon and steelhead on the West Coast. We also believe in maximizing public comment for all proposed listings.

Concerning litigation on our proposed activities, there are three pending cases, the Umpqua River cutthroat, West Coast coho and West Coast steelhead trout. We presented schedules for all three of these species to the courts. In both the cases of coho and steelhead, the State of Oregon has agreed with our proposed schedule and has submitted a brief on behalf of the government. The State of California is expected to submit a brief on behalf of the government very soon.

Following the President's waiver of the ESA listing moratorium, I issued guidelines to all of our regions on restarting the program. Basically it is based on the following principles, which, frankly, are a mixture of my strong belief of reliance on science and some common sense. They are very similar to those that Director Rogers has shared. The first principle is the biological risk to a species, the degree of risk facing a species. An emergency listing to address an emergency that poses a significant risk to the well-being of a species is by definition our highest priority. Our next priority are final listings that will provide maximum benefit to the species when there are no concentrated efforts already in place to protect the species.

Second would be our principle of biological benefits from taking a pending action. The listings generally would be considered a higher priority than reclassification as listings provide species protection under the ESA either through section 7 consultations, section 10 or section 4(d) rules. That doesn't mean, however, that we shouldn't complete all of our reclassifications in a timely fashion.

In some instances, proposed listings may benefit a species. For example, a proposed listing could encourage commitments from both our Federal partners and non-Federal entities to protect a species even before or in lieu of listing. What I am getting at here is something I am promoting—habitat conservation plans with the private sector and with the states—to be proactive. Let us avoid listings if we can.

Mr. Chairman, our stewardship efforts will continue to concentrate on non-Federal conservation initiatives and regional consensus building. It is the agency's view that in the long-term, aggressive Federal, State and local conservation initiatives have the potential to significantly reduce the risk to many species.

Let me just cite a few examples of conservation plans in progress. We have in Maine the Atlantic Salmon Conservation Plan that the State is putting forward. We have habitat conservation plans for both the states of Washington and Oregon. These are mammoth. The HCP for the State of Washington involves a million acres. We have a habitat conservation plan under development right now, in the mid-Columbia for the PUDs, and several for private timber companies.

Mr. Chairman, that concludes my testimony. It is a pleasure to be here again, and I look forward to any questions the Committee may have.

[Statement of Rolland Schmitten may be found at end of hearing.]

Mr. POMBO. Thank you. Mr. Saxton, do you have questions of the panel?

Mr. SAXTON. Thank you, Mr. Chairman. I would like to also welcome all three of you here today. I know that in different respects, you have all worked very, very hard to represent your various constituencies and the agencies that you represent. We appreciate that.

Senator Bivins, I was interested in particular in part of your testimony where you made reference to—I have forgotten the exact name of the fox that had been proposed to become listed.

Mr. BIVINS. Swift fox.

Mr. SAXTON. Swift fox.

Mr. BIVINS. Right.

Mr. SAXTON. It was swift enough to get out of the way, I guess.

Mr. BIVINS. Nobody has ever seen it.

Mr. SAXTON. And you indicated that in this situation several states, I think you said five, had worked together, apparently, to develop a program or some kind of a habitat management program that was successful or that was thought to have the potential to be successful to help the species recover to the point where it would not be threatened. Is that a fair analysis or summary of what you said?

Mr. BIVINS. Yes, sir. I think all the states—and I am not certain of the number. I think it is five. Mr. Rogers may know exactly. All opposed the listing when it was proposed, and after they learned of the listing, they were able to work with the agency and convince the agency that instead of listing the species that a multi-state conservation or recovery plan that was led by the states would be preferable to listing the species at this time.

And I really applaud that action. In fact, when we had Acting Chairman Rogers in front of the Texas Natural Resources Committee, we beat him up pretty badly about doing these types of things, doing everything we can to avoid listing because of the draconian effects that listing has.

So we did get that done with the Swift fox. I am hopeful that we can have a comparable result with the Arkansas River shiner.

Mr. SAXTON. Senator, did the states work together to put in place some kind of a conservation program that benefited the Swift fox?

Mr. BIVINS. Yes, sir. There was a—in Texas our agency is called the Parks and Wildlife Department, but there are equivalent agencies in all of those states, Kansas, New Mexico—help me, John. I think Colorado and Oklahoma. All those State agencies are involved in that plan.

Mr. SAXTON. Do you believe it is preferable to have some preemptive activities and conservation programs in place that can help, too, from time to time avoid listings as you apparently successfully did?

Mr. BIVINS. I think it is vital. I mean, I don't think the Act as currently written can really survive unless we do more and more of this.

Mr. SAXTON. Mr. Rogers, you mentioned in your testimony the term statutory framework. In the current statute, is the framework permissive enough to allow these times of preemptory strikes, if you will, or programmed planning or conservation efforts? Do you need more tools to work with in order to encourage if not permit these types of activities to take place?

Mr. ROGERS. I suppose we could always use more tools, but we believe that the Act as currently laid out gives us the appropriate flexibility and tools to carry forth those kinds of activities. As an example, in 1992 we had 14 habitat conservation plans in place. At the end of last year, there were 142, and in 1997 we estimate more than 300 will be in development. Habitat conservation plans, as I am sure the members of this Committee know, are designed to provide for incidental take of listed species, but also very important is that when properly designed, HCPs also deal with the needs of candidate species that could prevent the need for their being listed. So we support those kinds of efforts, and to the extent our resources permit, we are always anxious to enter into new ones.

Mr. SAXTON. Thank you. Let me ask one other question, Mr. Rogers, while you are here. In your testimony you indicated that the listing program as it gins back up again will be a three-tiered system. And the third tier would include delisting. And it seems to fall into a category of importance that is somewhat less important in terms of the process than Tier 1 and Tier 2. Is that fair to say?

Mr. ROGERS. I would not characterize them as activities that are less important. I would characterize them as activities with less urgency. Obviously the Tier 1 activities are emergency listings. That is pretty evident. The Tier 2 activities are species that have already been evaluated and the determination has pretty much been made that they do deserve to move through the listing process, so the degree of biological urgency on Tier 2 species is higher than on actions that might occur under Tier 3, not necessarily less important.

Mr. SAXTON. I can sympathize with the feelings of some of my colleagues who from time to time see species listed, the grizzly in the west comes to mind, where the species seems to have been, to an outsider looking into the process, it appears that the grizzly has pretty well recovered, and yet the delisting process is not addressed as an issue. And that is an issue that is of some urgency to some of my colleagues and their constituents from the western part of the country. And so I am just curious as to how we might begin to address some of those kinds of issues where in fact it at least appears that recovery has occurred.

Mr. ROGERS. The final determination of whether the grizzly bear has recovered or warrants delisting has not yet been made. Right now we are carrying forward activities with grizzly bear under the recovery program. We have recently been named in a lawsuit that has asked us to determine habitat-based recovery criteria as well as population-based criteria, and we are currently going through that process. And once done, we would hope that then we have a new yardstick by which we can measure the success of grizzly bear activities and, if warranted, move forward.

Mr. SAXTON. Does the statute as it is currently written provide you with the flexibility that you need to determine the urgency of delisting? It appears that the intent of the Endangered Species Act is obviously to protect endangered species. And one of the things that might happen along the way if a species is recovered is that it might get delisted. I mean, that is the impression that we get from the process as we have watched it over the last few years. Is that an accurate characterization?

Mr. ROGERS. Yes, it is. Obviously you have characterized it correctly. It is there to protect species, but it is not there to carry on protection ad infinitum for species that don't need it.

Mr. SAXTON. Well, you know that I want the Endangered Species Act to work. You know that there are several members here who have approached the reauthorization of the ESA from a different perspective. One of the things that we have got to do among ourselves and among our constituencies is to find support for this program. And this is one of the issues that I think needs to be addressed from a public support perspective in order for us to get to a point where we can reauthorize a bill that will work and that makes sense to our constituencies. And that is why I wanted to explore that aspect of it with you. Thank you very much.

Mr. ROGERS. Thank you.

Mr. POMBO. Mr. Romero-Barceló, did you have some questions?

Mr. ROMERO-BARCELÓ. Thank you, Mr. Chairman, but I have no questions at this time.

Mr. POMBO. Thank you. Mr. Thornberry.

Mr. THORNBERRY. Thank you, Mr. Chairman. I think Mr. Saxton's last point is a key one, Mr. Rogers, that public support to make this work is absolutely essential. And I think back to testimony that Mr. Pombo's task force received in Texas by one of the State officials. And that was that more habitat for a bird, and I forget which one it was, was lost after it was listed than before because the problems too often now are that the government and the landowners are the enemies and they work against each other. We are not cooperative.

Senator Bivins, would you testify at least from your district about this issue of public support and working together rather than having one side versus another. What has that meant for the people that you represent?

Mr. BIVINS. Well, I think you are—the first part, Congressman, the species, I think, you are referring to is the Golden-beaked warbler—Golden-cheeked warbler, which the people in Central Texas had the misfortune to have critical habitat designated, and land values cratered. And as you pointed out, people got rid of the habitat so that they would not be subject to all the restrictions that went along with it.

In the proposed listing of the shiner, Fish and Wildlife had a hearing in Amarillo, Texas. And in a room that held about 200 people, 400 people showed up for that hearing. And as I pointed out to the folks from Fish and Wildlife, there wasn't a person there that was glad to see them. It is clearly adversarial today, because as I said, there is nothing but downside for the folks that are affected. And I think one of the ways to get public support is to create some carrots in this Act to encourage people to enter into conservation habitat recovery plans either through income tax credits or estate tax credits or some other mechanism where people are going to want to participate as opposed to feel like they are victims of the U.S. Fish and Wildlife when a species is listed.

Mr. THORNBERRY. Mr. Rogers, I would be interested in your comments on how we can work together more. And question number one is wouldn't that be more productive not only in taking the landowners situation into account, but also in helping species?

Question number two is do you have any comments about this situation that we face with the shiner where it seems to abound across the State line, but yet we want to get rid of it over there to protect another species and we want to protect it on the other side of the State line, which is another—getting back to Mr. Saxton's point, I suggest it is another reason the public thinks that we are not all quite operating with a full deck here as we try to do things that—we should be doing things that make sense rather than take away here and give there.

Mr. ROGERS. I think clear and open communication—maybe the lack of it in some instances—is behind many of the problems that we have faced. I would like to turn maybe slightly to the Golden-cheeked warbler example, maybe 180 degrees or maybe at least 90 degrees, because as we sit today it is more of a success than not. Critical habitat was not designated for the Golden-cheeked warbler, and it is also one of the principal species covered by the Balcones Canyonlands Conservation Plan, a major habitat conservation plan in central Texas, in Austin and Travis County. So in that respect it is a success.

Mr. THORNBERRY. But don't you—just a second. Don't you think—don't you recognize that people were scared to death in central Texas, just as people were scared to death in our neck of the woods? And it cannot survive, it cannot work when people are that terrified that they are going to lose everything they have worked for for their whole life.

Mr. ROGERS. I don't disagree with you. The communication process that caused or could have prevented that fright is what we all need to work on. I wouldn't disagree with you at all.

In terms of the incentive issue that you raised, we are very sensitive to the need for private property owners to have incentives to do positive things for endangered species without unintentionally later on feeling the heavy hand of the law on their shoulders in such things as the safe harbor policy. It provides assurances to a landowner that if he or she manages for a certain suite of endangered species and ultimately wishes to take their land condition back to their preagreement situation, that they will be able to do so without penalty. There have been obviously issues of tax incentives and others raised, and we are eager to enter into discussions on issues that do provide the positive feedback for private landowners.

Mr. THORNBERRY. Do you have any comment on the shiner situation where you are taking—where the proposed listing would take care of it on the Texas side and you are trying to get rid of it on the New Mexico side of the line?

Mr. ROGERS. Any comment I make would have would be based on what I heard this morning, and I couldn't make an intelligent comment on it. We can get back to you for the record on that if you would like.

Mr. THORNBERRY. I'd appreciate it. Mr. Chairman, let me just close with one other situation that Senator Bivins and I find ourselves in. We both represent a nuclear weapons construction plant that has some leftover contamination going back to World War II, and yet what we find today, based on articles that were in the paper this weekend, is that there may be some Swift fox dens in

this area that we are trying to clean up. So the environmental cleanup of this potentially toxic situation has been put on hold until these pups grow up, at least, or some way can be found to deal with the Swift fox problem. It is just another example, it seems to me, of where sometimes I think that we are not complete—we are not in balance as we should, and that is one of the reasons I think your efforts and other efforts to make this thing work better for everyone are so needed. Thank you.

Mr. POMBO. Thank you. Mr. Pickett.

Mr. PICKETT. Thank you, Mr. Chairman. I apologize I was not able to hear the previous part of the testimony this morning, but I think that the logical follow-up question to what Mr. Thornberry posed to you is is there any way to legislate some common sense into this process?

Mr. ROGERS. Not to be facetious, I don't think there is any way to legislate common sense.

Mr. PICKETT. That is apparent.

Mr. ROGERS. We have all got to practice it.

Mr. PICKETT. That is very apparent, but it seems to me that we allow situations to develop that, as has been stated previously, create more in the way of friction and a lack of cooperation, a lack of will to want to go forward with this by the way in which the Act is being administered.

Did the issue about whether or not there was any prospective change in the process for listing come up in the previous testimony? This morning, I meant.

Mr. ROGERS. I don't think so.

mr. PICKETT. I am curious to know whether you anticipate with the backlog of proposed additions to the endangered species list that you will change in any way the process for making the listings.

Mr. ROGERS. As far as the Fish and Wildlife Service is concerned, as I laid out in the testimony, biology will drive the order in which species are considered. The Endangered Species Act is there to protect species, and therefore those that receive our attention first will be the ones most in need of the protection. In terms of the process, we are placing greater emphasis as we move forward with public involvement and, as Rollie Schmitten mentioned, peer review to make sure from independent reviewers concurrent with the public comment period that the best science, and most up-to-date information is in fact used in the listing process.

Mr. PICKETT. Did you wish to add something to that, sir?

Mr. SCHMITTEN. Yes, Congressman Pickett, I think some of the lessons learned from the recent listings is, first of all, we need a more informed public. We need a more involved public, and certainly we need science to guide the decision. There has been a perception, right or wrong, that the ESA activities have been under Federal jurisdiction done privately behind closed doors.

And there is a ten-point policy that the Secretaries of Interior and Commerce promulgated, and several things, I think, get at the question you are asking. One, involve the other partners, primarily the states, early in the process and throughout the process. Two, hold multiple public hearings. For the salmon we have now held 23 public hearings. Improve your science. The credibility of science

through peer review is something that we have undertaken. And finally look for private property incentives, such as programs that can bring people along through an incentive process. One of those is something Fish and Wildlife established, the habitat conservation plans. This involves a proactive approach that NMFS so thoroughly believes in that we have loaned people to their process to be a part of that. HCPs provide a private owner the ability to control their destiny. If a conservation plan is developed that we agree to and we are a part of that process, frankly that will either cause no listing, or if a listing is in place, we will accept that plan in lieu of our plan.

Mr. PICKETT. What procedures do you have in place to ensure that you get a balanced presentation when the evidence is being presented in support of listing a species?

Mr. SCHMITTEN. I think it goes back to the issue of credible science. And the commitment for National Marine Fisheries Service is that once we have decided which way to go with a proposed listing, we will send that out for independent peer review by three outside experts in this area, whether it is steelhead, whether it is Atlantic salmon or whatever it is, to make sure that we do have good independent data in our decision.

Mr. PICKETT. What criteria do you use in establishing whether a species may be endangered in a particular area but there are other areas where there is an ample supply of the species? How do you handle those types of situations?

Mr. ROGERS. There are procedures laid out in the Act, criteria against which the species status should be measured in order to make the determination. There are five factors: First is the present or potential destruction, modification or curtailment of the habitat in which they live. Second is over-utilization for commercial, scientific or educational purposes. Disease or predation is another factor. Inadequacy of existing regulatory mechanisms is a fourth factor. And finally other natural or man-made factors that may be pressing. So these criteria are those against which the population status or the status of a species are measured in going through the listing process.

Mr. PICKETT. And is it a part of your procedures or process to develop the pros and cons on each one of those characteristics?

Mr. ROGERS. Yes.

Mr. PICKETT. And this is made a part of your record?

Mr. ROGERS. Yes.

Mr. PICKETT. Do you have any procedure for validating the statements and presentations that are made in support of or in opposition to listings?

Mr. ROGERS. That is the purpose of the peer review process, to get independent outside experts to look at the record and validate, or not, our determination.

Mr. PICKETT. Is there an appeal process from the listing or refusal to list?

Mr. ROGERS. Somebody can correct me if I am wrong, but I do not believe there is an appeal process. I know the Congress recently passed a law by which review of major Federal actions occurs within a 60-day period after their enactment. And I suppose

the Congress could take independent action, but there is not an appeal process as part of the law.

Mr. PICKETT. Thank you. Thank you, Mr. Chairman.

Mr. POMBO. Mr. Pickett, I believe that in the law that if he refuses to list, you can sue in Federal court on that, if he lists, that there is no provision to sue based on that. So that the provision is there if Fish and Wildlife refuses to list, that you can then file suit on that.

Mr. ROGERS. Mr. Pombo, I understand that—it was whispered in my ear that you can sue either way.

Mr. POMBO. I believe you are incorrect, because you don't have standing to sue. You don't have standing. I don't know how you would have standing under the current implementation of the Act to sue based on that.

I was just told by staff that that is going to be a Supreme Court case that should come up sometime this summer as to whether or not someone has standing to sue based on that, but it has not been decided yet.

Mr. Cooley.

Mr. COOLEY. Thank you, Mr. Chairman. Mr. Rogers, I have a situation in my State that I would like to ask you some specific questions on. I don't mean to be confrontational but I want to ask these questions even though they will seem to be. Does the ESA make a distinction between urban and rural areas when it comes to protecting a threatened endangered species?

Mr. ROGERS. Not to my knowledge.

Mr. COOLEY. Does the ESA contain any broad stipulations about protecting a threatened or endangered species because it resides in an area that would not be considered a species natural habitat?

Mr. ROGERS. I believe it does.

Mr. COOLEY. Could you explain that to me?

Mr. ROGERS. The Endangered Species Act focuses on species and the habitats in which they occur, principally with reference to where they naturally occur. An introduced population is not covered.

Mr. COOLEY. So you say the species that is in a habitat that they are not normally in are affected by a special rule? Do you enforce this ESA rule?

Mr. ROGERS. Only if they have been introduced subject to an experimental, nonessential population rule, such as is being done with a number of species.

Mr. COOLEY. If we had a spotted owl living in a drainpipe, which is not their normal habitat, would there be an exclusion to the Endangered Species Rule?

Mr. ROGERS. I can't answer that.

Mr. COOLEY. Well, now wait a minute. You just said——

Mr. ROGERS. The birds are protected as individuals against take. Their habitat is also protected. If you took down a drainpipe that a spotted owl was seen perching on or in, the destruction of that habitat without damage, excuse me, the destruction of that drainpipe without damage to that individual owl would be OK.

Mr. COOLEY. OK.

Mr. ROGERS. Physical habitat for the owl has certain constituent elements that have been described. And it is those constituent elements in the case of an owl.

Mr. COOLEY. Well, I just used an owl, because I have something else. In Portland, Oregon, we have a curious situation. There are three nesting pairs of endangered peregrine falcons in Portland. One pair is in a building and two are on a bridge. According to the U.S. Fish and Wildlife in Portland, unless there is some major bridge maintenance or modification, there would be no steps taken to protect these falcon because they have obviously acclimated to their urban conditions.

Now if these falcons were nesting in a rural area, a rancher would be unable to manage his lands or control insect infestation within seven miles of the nest. Let us focus on a pair of endangered peregrines that are nesting in the Freemont Bridge, which happens to be an interstate highway. This particular nest was home to three baby endangered peregrine falcons until Monday, June 3, when one of the babies left the nest too early to fly. On Tuesday, the 4th, the second baby also left the same nest, even though it could not fly. Both of them were severely injured in the fall but are being nursed back to health. Still, the U.S. Wildlife Service is not going to do anything to protect the only remaining babe in the nest, even though they admitted that the first two had been disturbed and probably were forced to leave the nest early.

What could have disturbed these things, the interstate highway, the traffic, increased river traffic, a carnival ride brought in by the Portland annual Rose Festival? Helicopters were used to land and take people on rides. What I would like to ask is how can the Fish and Wildlife justify the inconsistent application of the Endangered Species Act to protect an endangered species just because it chose to live in an urban area, particularly because these have already lost two endangered falcon babies because of lack of protection.

If this was in a rural area and it was a farmer or a rancher that wanted to move his cattle or anything else across the line, you would be down there with the men in black jackets and your M–16s shutting the whole area down. And yet we have the same situation in an urban area and nothing is being done. We really feel that there is a double standard, and we would like to know where the Department stands on that double standard. These are facts and we obtained these facts ourselves.

Mr. ROGERS. I don't know enough about the specifics of this case to sit here today and answer it, but we would be more than happy to look into it and get back with you either in person or in writing subsequent to this hearing.

Mr. COOLEY. OK, the thing that I am asking is that this doesn't need to be answered in a specific case. You as the Acting Director know the rules and regulations. If the agricultural or the rural communities are forced to adhere to the Endangered Species Act as your department has mandated in the past, why is something like this not as strictly enforced as the other rules?

Mr. ROGERS. Your point, I believe, is that regardless of the situation we need to be consistent in application of the law. And I agree with that point. In cases where we are not consistent, we need to look into it and make sure that everybody understands what we

are doing and why we are doing it. And so I couldn't agree with you more that we need to be consistent and people need to understand.

Mr. COOLEY. Mr. Rogers, I am trying to put you on the spot, but the problem has been seen by many people throughout small communities all over the country and they are afraid. They are terrified of the Fish and Wildlife Service. The inconsistencies of the applications of your law make everybody frightened because it seems to be discretionary. It seems like you do one thing in one area and something else in another area. I think that the public has a right to be frightened.

We don't certainly have much oversight over you, nor does anybody else. I think that this point here was just to bring up the fact that maybe there will be too many people disturbed if you enforce the ESA on Portland at the particular bridge. You would run into a lot of problems and a lot of public opinion, but if you do it to a farmer out there when he is by himself, who cares. I think that was the point I wanted to bring out in my question. When we worked on the ESA rewrite, we tried to put some common sense language and some latitude in this. Of course, we did not achieve that, but I think that this is a case in point to where the agency itself should take a look at the way they promulgated their regulations to comply with the law. I think you went way beyond the original concept of the law itself.

Mr ROGERS. Your point is well taken that we need to be consistent and people need to understand what we are doing and why we are doing it.

Mr. COOLEY. Thank you, Mr. Chairman.

Mr. POMBO. Mr. Abercrombie.

Mr. ABERCROMBIE. Thank you very much, Mr. Chairman. Mr. Rogers, in the material—I don't know whether you have seen the material that was passed out by the Committee staff on resources. In that material is a list of proposed species in chronological order as of April 30, 1996. They propose going back to May of 1991 and listing the date that the species was proposed, the status, the common name and the historic range. And it goes up to October of 19—yes, October of 1995. The overwhelming majority of species listed there are in Hawaii. I assume that you are familiar, at least, with this list even if you don't actually have it in front of you. It starts way back with the addax, gazelle, bighorn sheep, et cetera, listed in California, New Mexico. It goes through mostly plants in Hawaii. Are you familiar with the general idea of what I am talking about?

Mr. ROGERS. Yes.

Mr. ABERCROMBIE. It would be—I would for the record read into the record all the Hawaiian names, Mr. Chairman, but out of deference to yourself and the other members, I won't. I won't ask anybody else to try and pronounce a lot of the names.

Mr. POMBO. We will include the entire list in the record, and I will have you explain to me how to pronounce them later.

[The information may be found at end of hearing.]

Mr. ABERCROMBIE. Right. I will just bring up the haha for right now, but my point in bringing that up, Mr. Rogers, is—if I can take off a little bit or extend a little bit what Mr. Cooley was saying,

is that to some degree many of the species that are listed in Hawaii, that is to say are proposed, are there because of our isolation. They exist there and virtually nowhere else. And in many instances, they are exotic. That is to say if you go back historically in Hawaii, many of these species have come in as a result of all kinds of things, including the invention of the airplane, the internal combustion engine and steam and sail, commercial activity over hundreds of years. And displacing species, both plant and animal, that existed in Hawaii previously are in the process right now.

So one of the things that bothers me is that some of the rhetorical dialog, if you will, that has taken place, I think, possibly confuses or obfuscates a really essential discussion with respect to what Fish and Wildlife will do or not do in deciding whether to list something in an area of origination. I am thinking of Senator Bivins' statement, I think, about rivers, whether a particular fish, for example, was introduced into a river or whether it originated in a river.

These things—my point being that historically point of origin is not necessarily the basis upon which a species establishes itself. It can be taken various ways, including natural ways. I mean birds, lots of things that have been established in Hawaii came as a result of, say, seeds being brought by birds over hundreds, even thousands of miles over the ocean and then deposited in the land in Hawaii, and plant species establish themselves.

So my question or the observation I would like you to make is with respect to how we might revise the ESA to the degree that we do. Is there something that you are contemplating in relation to the Endangered Species Act that will move us beyond the rhetorical confrontation? I don't think it does us a lot of good to say that people are terrified of the Fish and Wildlife Service. I am not terrified of you, Mr. Rogers.

Mr. ROGERS. I appreciate that.

Mr. ABERCROMBIE. And I certainly would invite you to come to Hawaii, if we could manage to get anybody to come out there who wouldn't be in fear of the Washington Times exposing them for coming to one of the states of the union. But I do think that it is important to try to take into account a listing, not so much from the point of view of consistency, because you could be consistently wrong, but rather consistent in the sense of trying to take into account how species arrived where they are, why it is important to us as human beings to be respectful of them and their habitat other than our own species, and what we can do to try to accommodate both, if possible, without becoming rigidified to the point that they become enemies of each other.

Mr. ROGERS. It is a good statement. Most of the species on the list, Hawaiian—all of the species, as far as we know, on the Hawaiian list are naturally occurring. That is within historic times naturally occurring.

Mr. ABERCROMBIE. No, I agree. These are, but there are many there that aren't, and they compete fiercely with one another for—literally for existence.

Mr. ROGERS. As a matter of fact, and I have been to Hawaii, and it is worth going back to, but one is struck in Hawaii by the beauty

and diversity of the flora and fauna, but on closer inspection more than half of what you see is exotic.

Mr. ABERCROMBIE. And much of it is destructive in the sense——

Mr. ROGERS. It is that half that has reduced in many instances the diversity of what was there originally. We were at a meeting yesterday with Senator Akaka, who as you probably know is leading the charge to try to prevent further spread of exotics both to Hawaii and elsewhere. And I guess the point is that exotics are in fact one of the major causes of endangerment of many of the species we consider today.

Mr. ABERCROMBIE. If I could just have a moment more, Mr. Chairman. I realize the time is up.

One of the things that happens, and I am sure that Senator Bivins would be interested and others, we are—we have been the subject of—we in Hawaii have been the subject in some instances of what, I guess, some people think is hilarious commentary about trying to prevent the brown tree snake from being established in Hawaii. And it is deadly serious business, and I use the word deadly because that is exactly what it is. If the brown tree snake is reestablished from other areas in the Pacific like Guam and gets loose in Hawaii, we will—there won't be a bird alive. Every living creature aside from human beings is in danger of being eliminated totally. A kind of animal version of a holocaust will occur. Everything will be destroyed. And so we try to prevent that. I mean, it is a very, very difficult proposition. I suppose the brown tree snake is indigenous someplace and might qualify.

I am not trying to get the equivalent in Texas or elsewhere, but what I am trying to drive at is that—and this is in relation to trying to revise it, Mr. Chairman, the Act, in what has been termed a sensible way or common sense way. What I am trying to get at is that what we need to do, it seems to me, is to try and determine where we have urbanized, where we have a rural area that may be in competition, speaking in terms of habitat, with other species and try to figure out a way where we can accommodate both the species and the species other than human in the various habitats that we have established, generally under this rule an urban category. And I guess suburban now, somehow we have to try and fit that in. And I have an idea that that comes in more often than not.

And so I don't envy the Chairman his task here in trying to do this, but I appeal to you not to be inhibited by some of the more inflated rhetoric that might come around this that the press seizes on, but rather that the emotions expressed and the fears expressed—I don't mean fears in a terrified sense, but fears in the anxiety sense. Suggestions could be made, I hope, coming from Fish and Wildlife where we can arrive at a consensus that will benefit all the species given the context that we are in in contemporary times.

Mr. ROGERS. Agreed.

Mr. ABERCROMBIE. Thank you, Mr. Chairman.

Mr. POMBO. Thank you. Mrs. Chenoweth.

Mrs. CHENOWETH. Thank you, Mr. Chairman. I found the gentleman from Hawaii's comments very interesting. I think that with information we have been provided that Hawaii has 222 listed spe-

cies and 708 candidate species compared to Alaska's five listed species and candidate species of 45, I can see your concern.

Mr. Rogers, back in 1990 the Inspector General of the Department of Interior estimated that the cost of recovering all presently known species would be at $4.6 billion. And that was using a figure that would calibrate out to $2 million per species. The top ten most expensive recovery plans include, instead of $2 million per species, the Atlantic green turtle at $88 million, a loggerhead turtle at $86 million, the blunt-nosed leopard lizard at $70 million, Camp Riddle sea turtle at $63 million, the black-capped vireo at $53 million.

And we have a statement in here from Michael Bean of the Environmental Defense Fund. In spite of all of this money that has been spent, Michael Bean of the Environmental Defense Fund says despite nearly a quarter century of protection as an endangered species, the red-cockaded woodpecker is closer to extinction today than it was a quarter of a century ago when it was—when the protection began.

A quarter of a century ago. Why haven't we been able to reach a conclusion with some of these species in spite of all of the money that has been spent? Why have we not been able to recover and come to a conclusion and let America get on with its business?

Mr. ROGERS. There are a number of answers to the general question. One could say maybe we haven't made good on our commitment that was made when the species were listed to try to do what could be done to recover them. I can't discuss all those expenses or that report, but I do know that the red-cockaded woodpecker today is one of the outstanding success stories in the Southeastern United States. Timber company after timber company has lined up and joined with us in habitat conservation plans so that the red-cockaded woodpecker, while maybe not ready for delisting at this point, is in good shape and is expanding its current range because of the efforts of all of us. That, just by example, demonstrates that with the appropriate incentives and appropriate commitment we can do it.

Mrs. CHENOWETH. So actually what you are reporting to the Committee, then, in answer to my question is that working with private landowners on a voluntary basis without condemning their land has worked better than the taking of land for critical habitats in the past?

Mr. ROGERS. What I am saying is that if all of us work together and are committed to accomplishing our day-to-day activities while at the same time doing them in a manner that is sensitive to the needs of endangered species, we can do it. The Fish and Wildlife Service, the Department of Interior and the Federal Government, the State of Idaho, the local county, the private landowners there—none of us alone can do it. Together, if folks are really interested in sitting down, it can be done, and there are examples.

Mrs. CHENOWETH. The interesting thing about the Inspector General's report in 1990 is that it was only six—it is only six years old today, and at that time he was assuming a $2 million per species cost. And we are seeing hundreds of millions of dollars, billions of dollars.

Following up on the Chairman's question with regards to standing, the Ninth Circuit Court of Appeals in two cases, one entitled

Plenart v. *Bennett* and the other entitled *Nevada Land Association* v. *U.S. Forest Service*, the Ninth Circuit Court of Appeals has said that they don't believe that Congress in setting forth the factors to be weighed, including economics, in formulating a plan for protecting species meant that—they say that Congress intended to do more than to assure and insure a rational decisionmaking process.

Tell me, Mr. Rogers, do you believe that in addition to the species having standing in court automatically, do you believe that human beings should also have standing in court if they are impacted directly, such as an economic impact regarding their ability to make a living or their private property? Do you or do you not believe humans should have standing?

Mr. ROGERS. Humans are part of the total equation, yes.

Mrs. CHENOWETH. So you believe——

Mr. ROGERS. Equal standing in court—I can't begin to address that as I am not a lawyer. We can get back to you with the answer, or with the indulgence of the Committee, I could ask John Leshy, the departmental solicitor, to address that.

Mrs. CHENOWETH. I would be happy to listen to whomever you want, but you are Acting Director. I know under the circumstances, by the way, it is not pleasant and our hearts go out to Mrs. Beattie, too. She is a remarkable woman and I am sorry that you are appearing as the Acting Director under those circumstances. But I wonder if you could provide the Committee with an answer for not only the Department but the Administration, taking into consideration the whole body of law that has gone before in this country? Should humans have standing in court or in assumed damage?

Mr. ROGERS. John.

Mr. LESHY. Mr. Chairman, Congresswoman Chenoweth, I would be happy to get back to you. The case you quoted from is actually in the Supreme Court now and the United States is in the process, literally as we speak, of putting together a brief on that issue. It should be filed within a couple of weeks. And after that is filed, I would be happy to get back to you with detailed information.

Mrs. CHENOWETH. You know, there is——

Mr. POMBO. If the gentlewoman would yield for just a minute.

Mrs. CHENOWETH. Yes.

Mr. POMBO. You need to identify yourself for the record so that they know who said that.

Mr. LESHY. I am sorry. I am John Leshy, the Solicitor, Department of Interior, Mr. Chairman.

Mr. POMBO. Thank you.

Mrs. CHENOWETH. Thank you, Mr. Chairman. Mr. Chairman, with your indulgence I would like to ask Mr. Leshy further. You know, you are not only known within the Department, but all over the Nation as being a very bright lawyer. You have studied law very well. And I just want to know—I mean, we don't—lots of times we react to the Supreme Court decisions. Sometimes we don't. Your department doesn't always react to the Supreme Court decisions with regards to the taking of property. I just want to know what your opinion would be. I mean, I am asking you a direct question, what your opinion would be. Should humans have standing in any case when—including the Endangered Species Act or more specifically in the Endangered Species Act along with species? That

doesn't mean excluding species. It means if—I mean, the courts have always been open if someone alleges that they have been damaged. The courts have always been open in the past.

Mr. LESHY. Mr. Chairman, Congresswoman Chenoweth, of course, we believe very deeply in judicial review. We think the decisions that the Department and all of its agencies make ought to be subject to scrutiny in the courts. The rules of standing are very technical and very complex in the case that you mentioned, *Bennett* versus *Plenart*. One of the problems was that only the Fish and Wildlife Service was named as the defendant in that case and not the agency that actually took the action in implementing the biological opinion, the Bureau of Reclamation. So there is a particular technical problem in that case which poses some complexity in terms of formulating a position, but in general there is no doubt that we believe strongly in judicial review. We want our decisions to hold up to scrutiny. We don't mind the courts looking at them in the proper case where the proper plaintiffs are there that meet the constitutional standards for standing.

Mrs. CHENOWETH. Mr. Leshy, you sound like a very good lawyer, but you haven't answered my question. Now, the plaintiffs were two irrigation districts and two ranchers.

Mr. LESHY. Right.

Mrs. CHENOWETH. If—do the ranchers and the irrigation districts, in your opinion, do they have open access to the courts to allege the damages that have occurred? Shouldn't they have open access to our court system along with the endangered species?

Mr. LESHY. Well, the Supreme Court has long said that you have to meet certain tests of injury in order to go into court. And the Supreme Court in recent years has tightened up those rules and made it a little more difficult to get into court. We obviously have an obligation to follow the Constitution and the rules that have been laid down by the Court on standing. And in the proper case we have been reminded by the courts many times that, if these plaintiffs are not the proper plaintiffs or have not made the proper allegations, then they shouldn't be there. So you have to go ultimately on a case-by-case basis.

Mrs. CHENOWETH. Mr. Leshy, in the case of *Bennett* v. *Plenert*, of course, the court ruled that these plaintiffs were outside the zone of interest, but until *Bennett* v. *Plenert*, and some of the cases that may have come up under the Clean Water Act, I am not sure about that, but primarily the load of case law that has come down with regards to a person being able to allege damages for recovery purposes has laid out certain standards. The Supreme Court and almost every other court have laid out certain standards that have to be met for recovery. But I have got to say, and I am sure you would have to agree with me in all honesty, it is highly unusual to apply those standards for standing that have been applied historically for damages. There is such a clear difference there.

Mr. LESHY. There are two different kinds of lawsuits, I think, that we are talking about. One is a lawsuit such as *Bennett* that challenges an agency action carried out under the Endangered Species Act as being wrong, inconsistent with the statute. There is a separate kind of lawsuit where property owners can go to the Court of Federal Claims and claim compensation for loss of property

under our constitutional taking standard. And the standing rules for those two different lawsuits are or can be different. So we have to, again, be specific about the kind of case we are talking about.

The Supreme Court, in the *Bennett* case where they have already granted review, will certainly, we hope, provide a lot more guidance in this area and lay down some rules that we will obviously follow. So we welcome the review of the court in that case to clarify these kinds of rules.

Mrs. CHENOWETH. But in the short run, what you are telling me in plain old rancher language from Idaho is that you are not going to answer my question, right?

Mr. LESHY. Well, I am sorry. I thought I did.

Mrs. CHENOWETH. OK.

Mr. LESHY. As I said, I think the best thing for us to do is to get back to you in writing after we have filed the brief in *Bennett* and we can address both the Chairman's questions and your question.

Mrs. CHENOWETH. Thank you, Mr. Leshy. And, Mr. Chairman, I just have one more comment. And that was the gentleman from Hawaii was talking about the fact that the brown tree snake would be terrible if it were introduced. It would cause terrible damage if it were introduced in Hawaii, and I know now they are trying to preserve its status as endangered or impose an endangered status on the brown tree snake in Guam, but that is the same thing that we in Idaho face, not with a snake, but with the grizzly bear. The same ramifications are occurring. And even though this Congress has reduced funding, our states have said no, we don't want any more grizzly bears in Idaho, we still continue to get them. And I think it is that kind of program that creates not the good working relationships that could be worked out as Mr. Saxton had mentioned in his questioning and as was brought up with the red-cockaded woodpecker incident. And I hope in the future that we can see a lessening of those adversarial situations. Thank you, Mr. Chairman.

Mr. POMBO. Thank you. Mr. Kildee is next, but just for a brief moment I will yield to Mr. Saxton.

Mr. SAXTON. I am sorry. Let Mr. Kildee go first. I didn't realize you were——

Mr. KILDEE. Thank you, Mr. Chairman. I apologize for not being here at the beginning of the hearing. I had another meeting. But I will make a comment, not so much directly on the Endangered Species Act, but like Representative Abercrombie I am not terrified of the U.S. Fish and Wildlife Service. Your office in Lansing, Michigan, to my mind, has worked very well and very sensitively with local government and with the business community in Lapeer, Michigan, in a very, very important project regarding wetlands. And I was really very impressed with your people out there. I think they—we pass the laws here and you enforce the laws. And I was really impressed with their knowledge of the laws and their sensitive regard to the local government there, the city of Lapeer, and the local business community.

So my own experience with U.S. Fish and Wildlife Service has been a very positive one through the years, and one just in the last couple months, very, very impressed with—these are people who

are balanced. They have the law to follow and they try to do it in a way that takes into account the considerations of the local unit of government and the local business community. In this instance I think it was a great page out of the U.S. Fish and Wildlife Service, which I think there are many pages like that.

I just wanted to bring that to your attention.

Mr. ROGERS. Thank you very much.

Mr. KILDEE. That is all, Mr. Chairman.

Mr. POMBO. Mr. Saxton.

Mr. SAXTON. Mr. Rogers, the information that we have here indicates that in April you were provided with about $4 million for your agency to carry out the listing process. In Fiscal Year '95, the appropriation, I believe, was $8 million for 12 months. My understanding is that the appropriators are looking at a $5 million appropriation for Fiscal Year '97.

Question number one, did you have adequate funding in '95 and '96? And do you believe that if it is a $5 million appropriation, you will have adequate funding for '97 for the listing program? Those are questions one and two. Question three is if not, what effect does that have on the listing process and specifically what effect does it have on our constituents who may be in favor of a good scientific approach to listing?

Mr. ROGERS. Let me see if I can remember all these properly so that I can address them. First of all, in 1995 we had initial appropriation of $8 million. That was reduced by a million and a half during the recision in April at the same time the moratorium came along. It is correct in '96 we have as of April a $4 million appropriation and the President's budget requested $7–1/2 million in '97. And the House so far has recommended an appropriation of $5 million.

We believe that with the appropriation of $4 million this year, we can make a very good start at getting out of the backlog that we face and may be able to list, if numbers themselves are important, as many as 140 of the 242—make decisions, excuse me, on as many as 140 of the 242 proposed species. Because the workload is concentrated variably across the country, and there is in California and Hawaii a preponderance of workload. The backlog will clear up less swiftly there than elsewhere, so we ought to be able to begin, very closely on or about the beginning of next fiscal year, a more balanced program across the country. We would not be able to make the expeditious progress that we might have in light of the fact that the appropriation so far recommended is two-thirds of what the President's budget requested. So we might in fact, excuse me, get to some of the Tier 3 activities a little later than we might with the full appropriation.

Mr. SAXTON. Let me just follow up by asking if it would be fair to say that your representation is that $5 million probably won't be enough to do the kind of a job that you would like to do for Fiscal Year '97, and that you might not be able, therefore, to get to the Tier 3 issues that are obviously important to some of our constituents, particularly in the area of delisting? What does it do when you don't have the money? Do you cut back on the science that you do when listing species?

Mr. ROGERS. We cut back on——

Mr. SAXTON. Where do you cut back?

Mr. ROGERS. We cut back on the pace. We just don't have the resources to do—respond to every petition appropriately. We don't have the resources to do the full job that needs to be done on each species. And additionally, it is difficult, probably impossible, to say, since we have been in business for about six weeks, it is difficult at this time to say really what we will face in October after we have got the listing program back up and essentially full speed for six months. But it is possible that some of those Tier 3 activities won't get done or at least won't get completed.

Mr. SAXTON. We may differ here on the Committee about pace that we would like to see you proceed to list. I would be in favor of the normal pace. Others here may be in favor of a slower pace, but what we all, I think, have in common is that we want you to make good decisions. And I am trying to find out from you what too little money makes in terms of the right and good decisions.

Mr. ROGERS. We will make good decisions. We will make fewer of them.

Mr. SAXTON. Thank you.

Mr. ROGERS. Fewer total decisions.

Mr. SAXTON. Thank you.

Mr. POMBO. Well, thank you. I had a few questions. I will start off with Mr. Rogers. One of the issues in answering questions that you responded to was on the Balcones Conservation Plan. It is my understanding, if my memory is correct, that is about less than two months since that has been signed in. I believe it has been about a month, but it has been less than two months since that has been signed. The latest report—and you say that the Golden-cheeked warbler is one of the success stories or the positive things that has happened. The latest report that we have received from Fish and Wildlife, that Congress has received from Fish and Wildlife, lists the Golden-cheeked warbler as a declining species.

And the Balcones plan that you referred to has a cost of approximately $100 million in order to implement that. It has not been raised yet and you don't have—I know that I spent some time in that part of Texas. I can tell you that the ranchers down there are terrified. They are afraid. They think that they are going to lose their ranch. I am glad that Mr. Kildee and Mr. Abercrombie have not had constituents approach them with the same fears that many of us have, and I am glad that is working in your part of the world. In a large part of this country it is not. These people are afraid.

And with the Golden-cheeked warbler, in specific, you list it as a declining species, not as a success. With the red-cockaded woodpecker, you also list that as a declining species and not as a success. Quite frankly, many people on both sides of this debate over the past couple of years have listed the red-cockaded woodpecker as one of the very real problems that exist under the current implementation of the Act because of the loss of habitat as a result of the way the Act is being implemented. Many people say that that is the perfect example of one of the major downfalls of the Act and the way it is being implemented, because that fear is very real. Whether it—whether you believe it is accurate or justified or whether we believe that it is accurate or justified really doesn't

matter, because the people out who are being regulated by this Act believe it is very real and justified.

Another issue that I wanted to respond to that came up earlier in the questions was you talked about saving habitat versus numbers of species. I believe it was in response to Mr. Saxton the first time around. If you don't have numbers, if you don't say that we need X number of grizzly bears in order to delist it, what would you do? What would you say, that we need so many acres of habitat?

Mr. ROGERS. I can't respond to that question with specific—specifically to the grizzly bear because——

Mr. POMBO. Well, not specifically the grizzly bear. I was just using that generically.

Mr. ROGERS. Assuming that the species was not subject to a considerable amount of the other five—four of the other five factors, that is take, disease predation, competition, et cetera, if the only factor was habitat, you could measure the needs of the species in terms of acres of habitat with the constituent element, whatever elements of the habitat are necessary for the survival of the species. So, yes, it could be done.

Mr. POMBO. OK, if that were the case—in my part of California there are a number of listed species. One of the issues that has been brought up by Fish and Wildlife was that habitat was destroyed in order to develop farming lands and cities within the Central Valley. If you need to increase the number of acres—if it is not numbers it is acres or it is habitat, would you then propose that we set aside so many acres of farm land, that we not allow cities to grow or that we take back the habitat that had been developed into suburbs? How would you go about doing that?

Mr. ROGERS. I understand that particularly in heavily occupied areas that are under heavy agriculture that the presence of habitat for various species is one of the principal problems for the species of interest. And it is certainly possible, and as I am sure you know with the habitat conservation planning efforts going on in California, that it is possible through the process to identify the needs of the species and also identify ways that those needs in terms of habitat appropriately managed are provided through the process. And I understand that habitat needs can be portrayed as no growth statements by those who would be, maybe, opposed to endangered species, but I will still say in general where local governments and our folks have sat down in a free and open atmosphere with a willingness of people to work together to conserve both the species while allowing the development activities or agriculture activities to go ahead, it can generally be done. It is not always easy.

Mr. POMBO. I understand the line that you are proceeding down and I have probably spent as much or more time than anyone in this room, but the question specifically was if it is no longer numbers and it is habitat—they claim that species have been put on the list because of a loss of habitat in the Central Valley of California because the habitat was—is now being farmed under irrigated agriculture, whereas before it was not irrigated, therefore they have lost farm land—they have lost habitat. If we are going to recover that habitat, does that necessarily mean that there are areas that are currently being farmed that will not be farmed?

Mr. ROGERS. That is possible, and it is really one of the elements of the safe harbor policy that I had discussed earlier. And the——

Mr. POMBO. No, that is not necessarily a safe harbor policy. The safe harbor policy deals with if I am farming and I create a situation which will attract endangered species to my property, that I don't necessarily lose that. What we are talking about here is the idea that we will take lands which are currently in production and try to go back in time and put them back to a habitat situation in which they were 150 years ago before they began to farm. And there is a big difference between those two. I think that the safe harbor provision is a great idea, and I think that that is a positive step. But what we are specifically talking about with the difference between protecting species and protecting habitat is much more far reaching. And it is a very different concept that we do need to go—that we do need to talk about, because if that is what we are going to do, the implications are very immense, especially in a part of the country like mine.

You are talking about areas that have been farmed for many generations that because of an action taken under the Endangered Species Act will no longer be farmed. And then we will get—then we will definitely get into a discussion on how are you going to pay for this land and how are you going to do that. You know, you have been able to operate by telling developers that they have to pay into a fund, but we are not talking about that anymore if you start doing it this way. So it is very different.

There is a couple other things that—other paths that I wanted to follow. One in particular, you talk about delistings being priority number three on your list, and yet June 14 you delisted the Lloyds hedgehog cactus, which in the Southwest you delisted that as being an endangered—well, at least that is when it appeared in the **Federal Register**. It is my understanding from the limited time that I have had to look into this that there was little or no controversy really surrounding this particular plant species on the Endangered Species List, that there was very little economic or social impact that had occurred in that region of the country because of this, that it was not a high visibility species, so to speak.

Why do—with limited funding that you keep talking about, with limited personnel that you keep talking about, why would you choose to spend agency personnel, agency money, looking into delisting a species that has resulted in very little or no conflict? At the same time, we have other species which have caused very high conflict that have resulted in the science that the agency uses being challenged, lawsuits being filed, general plans being held up in court. A lot of things are happening on some other species and you have chosen not to even look at those. You don't have the money, the time, the personnel to touch those, but on one like this which seems to me, at least in the amount of time I have had to look into this, that there has been little or no conflict over this particular listing.

Mr. ROGERS. First off, the decision to move or not move with that cactus package didn't have anything to do with controversy. Second, this was a completed package that was sitting in Washington, D.C., at the time the moratorium was lifted. All it meant was picking it up and taking it to the **Federal Register**. So that was

moved because it was sitting there ready to be moved. It would have probably not bc ı the right thing to do to have done anything more with it. Unfortunately, most of the other actions that we are anticipating taking are considerably more complex and are going to require review by the biologists, sometimes peer review, sometimes opening public comment periods. And to make sure that we are, in response to Mr. Saxton's question, making good decisions, it is going to take more time. But the fact or not of controversy is not weighing into our decisions.

Mr. POMBO. So this one was all ready to go. You did not have to expend any agency funds on this one?

Mr. ROGERS. Other than **Federal Register** costs, which are minimal.

Mr. POMBO. This was done on June 14. The listing was lifted April 26. So in a two-month time span you did nothing with this at all?

Mr. ROGERS. To my knowledge——

Mr. POMBO. You just took it down there. In response to your statement, it seems to me like the ones that are controversial and have caused a great deal of conflict, that those would take some type of priority. I am not asking you not to do good science. That is one of the arguments I have had with you guys is that I think you ought to do good science, but there should be some priority in trying to resolve some of the most contentious issues.

Mr. ROGERS. I can understand how you might feel that way about certain species from California, and I am sure others would have their feelings. We have, and I believe appropriately, established our priorities based on the magnitude and immediacy of the threats to the species and thus their need for protection under the Act, not the controversy that would be generated by them, nor the preferences of litigants or others. Because, I mean, I have this kind of apocalyptic vision with 242 proposed species that we end up with 242 judges sitting around deciding which one will be listed first. I don't think that would serve any of us well, and we are trying to make decisions based on biology and nothing else.

Mr. POMBO. I can understand that. The people involved are secondary. You have got your priorities that you have put down, and I can understand that that is the attitude that the agency takes. At the same time, I know that there has been a delisting petition that has been filed on the fairy shrimp in California, and yet the agency is continuing with establishing a recovery plan. They are spending money on that side of it at the same time that if and when you ever get around to priority number three, which is looking at delisting, you may delist that species. In the meantime, there have been funds expended by the agency, there has been time and effort expended by the agency on a recovery plan, and countless millions of dollars that have been spent by the private sector as a direct result of that listing. And it is my opinion that that very well will be delisted if you ever get around to looking at it.

Mr. ROGERS. I can't speak to whether or not it will be delisted, but the rather strange set of circumstances that you raise with respect to developing recovery actions under the recovery part of the Endangered Species Act without dealing with—without being able to do anything about it under the listing activity is just one of the

things that I think, it is not an artifact, it is direct consequence of the moratorium and the fact that we were not able to do our job for the last year on the listing program. So——

Mr. POMBO. The moratorium——

Mr. ROGERS. It would have been less responsive—excuse me, less responsible not to do anything about recovery than it would be to have begun to look at the recovery activity.

Mr. POMBO. Even if the species is truly not endangered?

Mr. ROGERS. We don't have any information that we have evaluated to allow us to come to that decision yet.

Mr. POMBO. No, that is—I guess that is my point. Maybe you ought to evaluate the science that is in front of you before you expend more money on that.

Mr. ROGERS. We will do that as we reach it in its appropriate priority.

Mr. POMBO. Well, my time has expired long ago. Mr. Thornberry had another question. Mr. Thornberry.

Mr. THORNBERRY. Mr. Chairman, as I listened to Mr. Abercrombie's situation, as I listened about the grizzly bears in Idaho, it—I come back to a deep anxiety about whether at a Federal level we are every going to make this thing work and deal with all of the individual situations. Senator Bivins commented earlier that perhaps we might decouple, in a way, and that is have the Federal Government list something but leave it up to the states to do something about it.

We talked about the Swift fox situation earlier. I would like to ask Senator Bivins at least in our State can you evaluate the ability and the willingness of the State to address these problems. Can we handle it or is this something only the Federal Government can do? And is this a situation where the people, at least in our State, are—don't care too much about it?

Mr. BIVINS. I think there are two questions there. The first one, I think the Swift fox protection initiative demonstrates clearly that A, the State is interested, and B, they can handle it. We have biologists on staff in Texas Parks and Wildlife and they are out there on the ground in far greater numbers than Federal employees in the State. So I think clearly they can handle it. I think that ought to be a part in a reauthorized ESA that focuses more on groups of species and ecosystems than taking a rifle shot at each species. And that gets me to the second part of your question about do people care. You know, we have heard a lot of talk about steelhead, Atlantic salmon, grizzly bear, Peregrine falcons, but we haven't heard talk about the Texas blind salamander or the Comell Springs ripple beetle or the Sacramento orcutt grass.

I don't think these were the species that were in people's minds when this Act was originally passed. I think these guys were doing their job, but I think the situation we have gotten ourselves into is much—is analogous to the Delaney Clause, which is part of the—I think it is in the health department, but the clause said we can't—we will not allow to add additives to food products that could potentially cause cancer. And at the time that that was put into Federal law, we had the technology to discover parts per million. We now have the technology to discover parts per billion, and yet the Delaney Clause is still law.

I think a similar thing has happened with endangered species. At the time the level of ecological science was not nearly where it is today. And I think unless we act and do something, that we are going to be in an analogous situation where we have painted ourselves into a corner and these guys are still just doing their job. So I don't think that people care. A lot of times that care is misguided. If a species is as significant as the brown tree snake, it needs—we need to pay attention to it, but if it has less significance—if you can't tell the difference between a Red River shiner and an Arkansas River shiner, maybe we need to prioritize and direct these guys to do that so that they are not creating these very frustrating situations.

Mr. THORNBERRY. I think that goes back to your point, Mr. Chairman. Thank you.

Mr. POMBO. Thank you. Mr. Rogers, I had one final question. It is a question that the Chairman had wanted to ask.

According to the Idaho Statesman, and I have a copy of the article here that ran Monday, June 24.

[The information may be found at end of hearing.]

Mr. POMBO. An environmental group called the Biodiversity Legal Foundation is suing the Fish and Wildlife Service over its recent change in how species are designated as candidate species. The new policy reduced the pending candidate list by magic from almost 4000 down to 260. This group claims that this is part of the Administration's effort to make the ESA more politically palatable. It is possible that the Administration is currently considering the political implications of how the ESA is used and that this suit may result in the reversal of your candidate species policy sometime later in the year.

How would you respond to that?

Mr. ROGERS. First, I would respond by saying that the new candidate policy recognized the application of good biology and sound science to the candidate list. Second, I would say that there may be somebody somewhere who is worrying about the political implications of implementing the Endangered Species Act, but the Fish and Wildlife Service is looking at the biological implications of implementing it.

And in terms of the specifics, in terms of that lawsuit, we disagree very firmly with the assertions that have been made by the Biodiversity Legal Foundation and will carry that as far as it needs to go to make our point.

And I just want one point that is off of your question. I want to clear up the record. The brown tree snake, the only way it is related to the Endangered Species Act is that it is a cause of the endangerment of a number of species. We—the National Biological Service and others—are currently looking at ways to eradicate the brown tree snake, not create more.

Mr. POMBO. I realize that earlier someone had mentioned something about the brown tree snake being on the endangered list, and of course it is not. It has taken over the island of Guam, or the islands, and is causing havoc in that area. And I think that all of us on the Committee would probably be in full support of reversing that trend because of the havoc that it is causing down there.

I would like to thank the panel for your answering the questions, for your testimony. I realize that we kept you a long time, but if you do not have another meeting that you have to run off to, I would appreciate it if someone from the Service would stay so that we could ask questions that may come up in the next panel. So I would appreciate that. Thank you.

I would like to call up the next panel: Mr. Steve Paulson, Mr. Eric Glitzenstein, Mr. Robin Rivett and Mr. Dennis Hollingsworth. Thank you very much. I appreciate you waiting.

Mr. Paulson, if you are prepared, you may begin. Thank you.

Mr. PAULSON. Thank you for having me. Good morning, my name is Steve Paulson. I am an environmental consultant with a company called SWCA that does work around the West with endangered species.

Mr. POMBO. Just pull it close to you.

Mr. PAULSON. OK. Good morning again. My name is Steve Paulson. I am an environmental consultant and we deal with endangered species issues all over the West. Thank you very much. I am here today representing the National Association of Home Builders and some of their opinions. I am here representing them for two reasons.

Can you hear me now?

Mr. POMBO. Just switch his mike and we can start his time over again.

STATEMENT OF STEVE PAULSON, NATIONAL ASSOCIATION OF HOME BUILDERS

Mr. PAULSON. Hi again. My name is Steve Paulson. Good morning. I am an environmental consultant with an environmental consulting firm called SWCA. We do endangered species work all over the West and in Texas. I live in Austin, Texas. I am here today representing the National Association of Home Builders. I am here for a couple of reasons. First, I have an extensive knowledge and hands-on experience with endangered species issues. I have done many habitat conservation plans, et cetera. Secondly, I have been working for the last couple of years with a working group for the National Association dealing with the Endangered Species Act and trying to come up with good, solid, consistent recommendations regarding the reauthorization of the Endangered Species Act.

I want to say first that I believe that the listing process which we are here to discuss today is the vulnerable underbelly of the Endangered Species Act, and currently controversial decisions regarding listings taint many of these decisions. Until Congress and Fish and Wildlife Service can design a listing process that is based on sound and reliable scientific information with consistent, carefully established guidelines, the entire Act will be vulnerable to attack from all sides. It will continue to be controversial.

The listing of the Golden-cheeked warbler in Central Texas is a bird that—a migratory bird that nests in Central Texas in the springtime, illustrates some of the flaws of the process. It was listed in 1990. I want to point out the Act's language is insufficient to guide Fish and Wildlife Service in their listing. Accordingly, the Agency routinely renders questionable listing decisions with little

basis in science. The listing process also does not provide adequate public notice of participation opportunities.

Now I will go through the problem with the Golden-cheeked warbler. Basically what happened, in 1990 through Section 6 money Fish and Wildlife had funded Parks and Wildlife to do a study. A researcher for Texas Parks and Wildlife named Rex Wahl and various associates were doing the study. That study was not released to the public until the listing process was actually completed and they had actually listed the species. Also the Wahl report was based on information stating that fragmentation and habitat loss was the number one cause for endangerment of the species.

They did not contact or if they did they spent about ten minutes with what is the renowned expert on the Golden-cheeked warbler, a Mr. Warren Pulich, who spent about 30 years dealing with the warbler. Basically the warbler was his life. Dr. Pulich wrote a letter to Fish and Wildlife Service during the review of some of the comments that came on later after the species was listed, and basically called into question some of those assumptions used by Wahl. He said that unless you ground truth or go out in the field and test these assumptions, these are just assumptions.

Unbeknownst to a lot of people, Fish and Wildlife had commissioned a study by Dr. Robert Benson. Dr. Benson was an A&M, Texas A&M professor. He went out and looked at the assumptions by Wahl and went to ground truth them. His data ran counter to the Wahl report and basically undermined a lot of the assumptions and opinions used by Wahl and by Fish and Wildlife in listing the species. This report, however, did not see the light of day and to this day it is still in draft form and not used by Fish and Wildlife in any of its determinations.

The listing of the warbler also exemplifies also how the public, especially landowners, are excluded from the decisionmaking process. The Wahl study used by Fish and Wildlife to justify the listing, as I pointed out earlier, was not available to the general public prior either to the emergency or the proposed rule, despite the fact that the study was funded by Section 6 money, which came from Fish and Wildlife Service. However, several members of the Biological Advisory Team for the Balcones Canyonlands Conservation Plan, including representatives of environmental organizations, had the opportunity to read the report.

Although I have focused on the example of the Golden-cheeked warbler, there are many more illustrations of the problems of the listing process. In Austin alone we face the specious list in the Barton Springs salamander and the procedurally defective and scientifically deficient listing of the karst vertebrates, which are cave-dwelling, troglodytic species.

Congress must ensure that the Act's significant protections are extending only to those species which are truly in danger of extinction. There are several means of accomplishing that goal. I have three recommendations. First, Congress should direct Fish and Wildlife to establish specific criteria for listing species which contains consistently applied guidelines. The first step in this process should be to develop a more specific and useful definition of endangered species. As currently written, an endangered species can be anything. They described the five things, the threats and the pre-

dation and things like that, that could cause them to list it. These definitions are so vague that virtually any species in decline could be considered endangered.

Second, Congress should improve the scientific data upon which the listing decisions are made. Petitioners should bear the burden of proving that the species is endangered or threatened. Congress should require a listing petition that contains substantial scientific or commercial data, and further the Act should define specific standards and requirement for what constitutes substantial information. And that includes field testing.

Finally, Congress should open the listing process up to the public review and participation. The general public does not read the **Federal Register**, and if you want to get peer review, you include the public in the process. You include them up front and you include them at all three phases, the candidate phase, the listing process phase and then finally after it is listed if there is any new information, that information should be made available to the public.

I am having difficulty in my work trying to understand why the Fish and Wildlife Service can make a lot of information available to various environmental groups and that the impacted parties are excluded from a lot of this information even through decisions under Freedom of Information Act.

I thank you and I will yield the rest of my time.

[Statement of Steve Paulson may be found at end of hearing.]

Mr. POMBO. Thank you. Mr. Glitzenstein.

STATEMENT OF ERIC GLITZENSTEIN, FUND FOR ANIMALS

Mr. GLITZENSTEIN. Thank you, Mr. Chairman. I have been asked to testify about a lawsuit that I brought on behalf of some organizations. I am—for the record, my name is Eric Glitzenstein. I am an attorney in Washington. I have my own firm, but I have represented environmental organizations. And we brought a lawsuit a number of years ago and settled it with the Bush Administration. And the purpose of that case was to expedite decisions on various species considered to be candidates for protection under the Endangered Species Act. And one of the things I just want to stress—I go into fair detail in my written testimony about exactly what the agreement was about and what it was attempted to accomplish, but if we can strive for a point of consensus here, I think one point might be that prompt decisions based on good science are in everybody's interests.

And, Representative Chenoweth, you brought up the question as to how could it be that we have to spend all this money on these species and they are still not doing better than they were before. And I think one of the objective reasons everybody would agree on is that for a lot of these species it takes so long to get to the point of actually doing something about them that they are in such desperate straits that you really have very limited regulatory flexibility by the time the species is dealt with, either by the Federal Government or a habitat conservation plan.

So I would hope that we could get a consensus that looking at a species early enough to look at warning signs, if we don't do something about the plight of that species, then it is going to have

a problem with habitat destruction, whatever it might be, so that the agencies and the private parties affected can in fact have more options to work out how you can deal with that before you need Federal listing and all of these problems that go along with Federal listing and some of the perceptions, as well as problems, come into play.

On the other side of the coin, if in fact the species doesn't ultimately require listing, it is also very useful for people in your districts and around the country to know about that earlier rather than later. And I think the fear and the anxiety that people have talked about is the fear and anxiety of having these species sit around as candidates for years if not decades. And I think a lot of the time that anxiety builds up over the course of time when we don't have decisions.

And so in that sense what I would hope is that everybody on all sides of this debate would look at whether or not actions which delay the process, however that process turns out, whether it leads to listing or it leads to a decision not to list, i.e., that the species can be handled in another way through a habitat conservation plan, State action, whatever it might be, that delay in a lot of respects exacerbates everybody's concerns, because it simply means that when we get to the point where a decision is necessary, the options are that much more limited. And that is one of the reasons, I think, if you look at a lot of those cases, why so much money had to be spent. Those species were really in pretty desperate straits by the time we got to list.

Now having said that, let me also make the point that there is more than one way to impose a moratorium on a Federal agency. Obviously you could do it by saying through legislation "thou shalt not make any decisions on endangered species." I think that the adverse consequences of doing that are fairly apparent at this point. It really delayed actions on those species affected by the moratorium.

There is another way to impose a moratorium, and the other way is to get the Federal agency—we have used the word "terrified," and I won't purport to speak about whether or not there are individuals around the country who fall in that category—but a lot of these Federal agency people are terrified by what Congress may do on the Endangered Species Act. And I find it rather shocking to sit here and listen to Mr. Rogers, for example, say that politics have played no role in the listing process. I think any of us who look at these species from any vantage point would have to agree that politics is playing an enormous if not the overriding factor in the listing process.

Attached to my testimony is one rather extraordinary document, Attachment 3, which was prepared about a species called The Alexander Archipelago wolf, which is a subspecies of wolf that exists in the Tongass National Forest in Alaska. And it reflects a briefing that was held among Fish and Wildlife Service biologists. And if you look at it, it has got the pros for listing the species and the cons for listing the species. Now the pros are that it would be "consistent with our analysis of the five factors in the listing regulations." In other words, it would be required by the law. The con is that it would be "least controversial with the agencies, industry

and the Alaskan delegation to Congress" if we didn't list the species. Now they went on and decided not to list the species. And I am not going to sit here and argue about whether or not that was a scientifically based decision or not, but, you know, this is one of those rare documents. You know these things are going on all the time. This is one of the rare documents which shows beyond any question that political factors have become enormously important in all of these decisions.

Now I personally believe that they shouldn't play a role, but let us not sit up here and pretend that we have got this biological analysis going on which is dictating the outcome of these decisions. Politics, for better or for worse, has become an enormous influence on the process.

Now we talked a moment ago—Mr. Rogers addressed the elimination of the 4000, what are called, "candidate two species." Again, if you look at what category two are supposed to do, those were supposed to be the warning signs. It was never supposed to be a situation where all 4000 of those would make their way onto the Endangered Species List. And biologists, and I think even some people on the other side of the fence on these issues, said yes, it is good for us to know about those category two species. Those are the ones which we might catch before we need to get into a Federal listing process. But the agency's response was not to say "let us continue to monitor those species and figure out how we can reduce the anxiety about them." Its response literally was to sweep 4000 species under the bureaucratic rug, which it did with the stroke of a pen, saying we will no longer monitor category two species. And now we hear biologists in the Fish and Wildlife Service time and again say, "well, previously we had a way of dealing with those problems before they got to be extreme, now we don't anymore, we will just have to wait until somebody files a listing petition."

My plea is let us apply good science, but let us also look at the reality of what the political football is doing to this process at the same time.

Thank you.

[Statement of Eric Glitzenstein may be found at end of hearing.]

Mr. POMBO. Thank you. Mr. Rivett.

STATEMENT OF ROBIN RIVETT, PACIFIC LEGAL FOUNDATION

Mr. RIVETT. Thank you, Mr. Chairman. On behalf of the Pacific Legal Foundation and the Fairy Shrimp Study Group, I appreciate the opportunity to present this testimony today. I am Rob Rivett. I am the Director of the Environmental Law section of Pacific Legal Foundation, and I have worked for the last year and a half or so with the Fairy Shrimp Study Group as an advisor. And I am grateful that you asked us here today to talk about our experiences as part of that group and with the administration of Endangered Species Act, especially with the listing and the delisting process itself.

The Fairy Shrimp Study Group is an organization of California businesses, statewide associations and individual businesses who are organized to reevaluate the endangered status of four listed species of California vernal pool shrimp. The group formed at the end of 1994 in response to the United States Fish and Wildlife

Service's listing of three species of fairy shrimp and one species of tadpole shrimp as endangered or threatened. Our group suspected, as did many members of the scientific community, that at the time of listing at least two of these four species were not endangered. And our principal task was to gather more information, and if our suspicions were correct, share the information with the Fish and Wildlife Service, and if needed, initiate delisting petition.

As a result of the effort, the Fairy Shrimp Study Group did file a delisting petition on February 29 of this year. It has not been acted upon. The group reached a number of conclusions as a result of its efforts. First and foremost is that Fish and Wildlife Service has really turned the Act into a mechanism to control land use activities rather than to protect sensitive species. The 1994 listing of fairy shrimp is a prime example.

Fairy shrimp are very small, freshwater crustaceans that have relatively short life cycles. They live in California's vernal pools and many other annual mud puddles that appear after rain. The pools form in permeable soil areas and dry up after the rainy season. Fairy shrimp eggs by the thousands can be found in dried soils in one vernal pool. Up to 800,000 have been found in one pool. They will spring to life after it rains. Fairy shrimp are found by the millions and millions in the Central Valley of California, where we have approximately one million acres of suitable habitat.

Since the 1994 listing of the shrimp, enormous economic impacts have resulted, none of which should have happened. Here is what we found out. The listing resulted even though there was a complete absence, and I say a complete absence, of credible scientific support, and there was no independent objective peer review of data underlying the scientific conclusions and studies. Had there been, the fact that there was no credible scientific data would have been pointed out.

Let me explain. There were two primary studies that were relied upon by the Service. One was in 1978, an unpublished, non-reviewed paper which estimated that 90 percent of the vernal pools in California had been lost and that two to three percent of the pools were being lost per year, when in actuality the historical loss is closer to 50 percent with current activities having virtually no impact on the total remaining vernal pool acreage. We still have a million acres of remaining vernal pool and fairy shrimp habitat.

The second study, which was cited some 41 times in the final rule, was a study of a utility pipeline right of way, and it was described by its authors as a random 200-mile transect in California. The authors wrote that this study demonstrated that two of the fairy shrimp were found in only ten out of 200 miles, or five percent, and that this demonstrated the need for the listing of these species.

Upon more careful review it showed that one of these species was found in 35 percent of the sites and the other was found in actually 43 percent of the sites. The problem was when we plotted the pipeline we found the survey missed most of the significant habitat. In fact, the pipeline study was clearly irrelevant as a scientific tool. I point you to the attachment that we have to our testimony, which shows where the pipeline went and shows where the vernal pool habitat is. They are totally inconsistent.

Now, this brings us to the next problem. Fish and Wildlife Service failed to use independent objective peer review of these studies. They argue that the comments of fairy shrimp proponents, some of their own employees, were adequate peer review, but none of these people evaluated the above studies' methodologies or their data for scientific and statistical validity, none of them. When the Fairy Shrimp Study Group pointed this out and other data, the other data was basically ignored. We had our own experts that provided testimony, principally biologist Paul Sugnet. It was ignored when it came to the listing of these species. Interestingly enough, we were told that Sugnet overestimated populations. We were never told why or how there was an overestimation. And in fact, one of Mr. Sugnet's studies was used to determine that a fifth species of fairy shrimp should not be listed.

When the Fairy Shrimp Study Group sought to spend its own resources to do further surveys to show that there were additional fairy shrimp populations, that they were vast and that they were unthreatened, Fish and Wildlife Service was totally uninterested. They were uninterested in doing any further survey work. We were consistently met with objections, with impossible conditions and stonewalling. After trying to work with the local Fish and Wildlife Service to gather more data with no success, we presented our information to the Secretary of Interior's Office, pointing out all the problems. And we were told we will get back to you. We were told there can be some corrections made here. We spent significant time and lots of effort traveling to Washington, going to Portland, dealing with the folks in Sacramento. We provided lots of pertinent information and the results were always the same, nothing. We never even received answers from these folks as to why they would do nothing for us.

We were extremely frustrated and we still are extremely frustrated. Accordingly, we offer a few recommendations with regard to the delisting and listing process. I think you have heard this to a certain degree already from other members of the panel.

The species listings must be based on a lot better scientific evidence. Evidence must be scientifically valid, which means it must be independently peer reviewed and statistically significant. Perhaps Congress should take a hands-on role in assuring independent peer review. A minimum level of field studies and surveys should be conducted prior to listing and scientifically valid public input must be considered. If public input is not considered scientifically valid, the basis for this determination must be fully and openly explained. Additionally, all administrative records of the listing process must be open to public review and comment to ensure above board decisionmaking. In this way there would be fewer chances for biased, unsupportable listing and delisting decisions based on little meaningful evidence.

With regard to species delisting, the Fish and Wildlife Service places this activity in a very low priority position, the lowest. Quite frankly, such prioritization demonstrates to us that the Service continues to be committed first and foremost to controlling land use. The Service seems to have little interest in demonstrating that under the current ESA when mistakes are made, they can and should be corrected. This attitude needs to be changed. We would

recommend that the best way to ensure such a commitment to fair, even-handed processing of delisting as well as listing petitions is to allocate separate appropriations for listing activities and separate adequate appropriations for delisting activities. Moreover, delisting criteria and standards should be the same as for listing. Simply put, there should not be a higher standard for delisting than for listing. Either a species is in need of protection or it is not. Thank you.

[Statement of Robin Rivett may be found at end of hearing.]

Mr. POMBO. Thank you. Mr. Hollingsworth.

STATEMENT OF DENNIS HOLLINGSWORTH, RIVERSIDE COUNTY FARM BUREAU

Mr. HOLLINGSWORTH. Thank you, Mr. Chairman, for the opportunity to speak today. I am representing Riverside County Farm Bureau as their Director of Natural Resources. We represent the interests of over 1700 member families, and we are affiliated with the California Farm Bureau Federation and the American Farm Bureau Federation. Together we represent the interests of over 4 million of the nation's farmers, ranchers and rural communities. I am going to tell you about some of our experiences over the last four years in the preparation and submission of a petition to delist a species that has never been in any danger of extinction.

As you know, the endangered listing of the Stephens' kangaroo rat caused severe problems in our county. Since its listing in 1988, many of our farm families have suffered economic loss, restrictions on the use of their properties and diminution in the value of their land. You know about the terrible injustice that was done to the Domenigoni family and the devastation of 29 homes caused by a wildfire exacerbated by Stephens' kangaroo rat restrictions.

A few years ago, the Farm Bureau's Board of Directors began to wonder how a species that was supposed to be so rare kept popping up all over the place. It seemed anywhere an economic activity or new land use was about to occur, kangaroo rats would be found, surveys would have to be performed and expensive fees paid. In March of 1992, I was hired by the Farm Bureau to investigate the status of the k-rat. Based on this research, I began preparing a delisting petition. The first thing that we needed was information about the k-rat, so we asked the local Fish and Wildlife Service for their k-rat files. The result was a handful of reports and documents handed over reluctantly and sporadically.

We found that in order for our friendly request to be taken seriously, we had to file a Freedom of Information Act request. That request was received at the regional office in Portland on August 13, 1992, and they indicated they would quickly reply. After months of waiting and despite statutory requirements in FOIA requiring strict response deadlines, we finally received the last of the materials on May 13, 1993, nine months after the Service had received our request and well past the deadlines. However, we were not finished battling the Service over what we should be allowed to see in the k-rat reports.

The Service wanted to heavily censor all of the reports that indicated the presence of the species. The first reports we received from the Service were useless in developing a picture of the status of the

species for a delisting petition. We were finally able to get the Service to only censor the exact locations of the populations and information about who the private landowners were that had k-rats on their land. However, these reports were still heavily censored. And this is an example of what we eventually received.

Interestingly, the Service was extremely concerned about protecting the privacy of landowners when it came to letting us know if endangered species were on their land, yet most landowners are unaware that each and every time there is a survey performed on their land for an endangered species by a private biologist holding a Section 10 permit, a copy of the survey automatically goes to the local office of the Service.

Another stated reason for not releasing the exact locations of the k-rats was that their disclosure might endanger the safety of the populations. In other words, that we might go out and destroy k-rats if we learned their locations. This points out the inherent problem with the ESA itself, and it shows that the Service is well aware of that problem. By so zealously protecting the locations of endangered species, the Service admits that the Act has created powerful disincentives to conserve species. This is the unfortunate adversarial situation landowners and America's wildlife have been placed in by this ill conceived law.

I could spend several hours just telling you some of the interesting and shocking things we learned through this process, but let me describe only a few, and that is that our investigation revealed that the Stephens' kangaroo rat has never been in any danger of extinction, that the Service's assumptions about the species' range, habitat, population, size, et cetera were all substantially underestimated and likewise their analyses of the threats to the species were grossly overestimated and purposely exaggerated. In fact, I think that Stephens' kangaroo rats are about as endangered as attorneys are, inside the beltway.

I have included a copy of our petition with my testimony for your review if you would like.

Another shocking example is the method by which the species was determined to be endangered rather than threatened. One single page document was all that we could find that provided any clue as to whether the Service determined to list the k-rat as endangered—as to how the Service determined this rather than threatened. It is a record of a phone conversation between the biologist in the local office who was preparing the listing package and Ron Nowak in the Office of Endangered Species. The record says, "Ron called and asked some questions about the kangaroo rat package. He said that in general I had presented a good case. He wanted the acreage figures clarified and some place names clarified as well. He wanted to know how much habitat is left. I, as best as I could, came up with some acreages. We then discussed whether threatened or endangered status would be more appropriate. We decided upon endangered."

In an entire record of over 20,000 pages and hundreds of surveys, reports, meeting records, agendas, documents of all types, this is the only evidence we could find of any analysis as to why the species should be listed under the more onerous status of endangered rather than threatened.

After this research, the Riverside County Farm Bureau submitted its delisting petition in April of 1995. Let me quickly recount to you what has happened, or probably more appropriately what has not happened since then. In March 1995, you remember, Secretary Babbitt announced his ten-point reform initiatives. Included are aspects for scientific peer review and a commitment to greater responsiveness by the agency.

On April 26 we submitted our petition, and on May 12 I hand delivered a foot-high packet of documents, that were largely obtained from the Service, to the Carlsbad office of the Service. On August 1 we inquired about the status of the petition, indicating that they were behind on their 90-day finding obligation, and we were informed from the Carlsbad supervisor that they would soon be publishing a finding. The following day we were contacted by the Service and told that they had never received the background packet of scientific information that was from their own files.

On October 31, 1995, a cover letter signed by you, Chairman Young, and Congressional representatives from our area, Calvert and Bono, forwarded the petition on our behalf to the Fish and Wildlife Service. October '95 through April '96 the Fish and Wildlife Service claimed that the moratorium did not allow them to process delisting petitions.

On May 8, after the Federal budget was signed, Secretary Babbitt appeared in Riverside at a press conference to sign the HCP for the k-rat. After his remarks, I was able to remind him of his reform initiatives and the lack of compliance by the agency and asked whether he could provide an estimate as to when the Service might provide us with a 90-day finding. He was very irritated in his response and said that I should contact my Congressman asking for more money for the ESA and said that there was absolutely money for listings, but absolutely no money for delistings. When I informed him that I had the opinion that the Endangered Species Act treated the processes equally, he got very irritated and stormed away from me.

The Secretary's reluctance to process delisting petitions is not only, in my opinion, contrary to the law, it is also bad policy. After all, the whole point of the Endangered Species Act is to list a species in trouble, get it recovered and then delist it.

When the public loses confidence in the enforcement of laws by seeing one portion enforced unfairly over another, they begin to mistrust the application of the whole law. What is happening in Riverside County is property owners are actively working their lands, disking, dragging, whatever it takes to make sure no species that might even be remotely sensitive takes up residence on their land. They are not doing this out of hostility to the species, but in self preservation. The presence of a listed species on private land has come to mean financial ruin and possibly the loss of one's livelihood. These reactions show that the Endangered Species Act is a complete failure.

The Secretary's priorities, rather than showing that the Act is workable and does not need reform, show that—coupled with these reactions and by private landowners to the law, show that it must be totally reworked and rethought before it can be successful. What

is needed is an Act that conserves species by allowing and encouraging landowners to be good stewards.

It should be an Act that is so simple to be immune from the bureaucratic evils that so often do not become apparent until years after the bill has left Congress and becomes law. In order to have an Act in which agencies can no longer twist, ignore, subvert and use both the scientific evidence and the statutory processes to further a political or ideological agenda, it must be a law that is simple, incentive based, and non-regulatory.

Our experience has shown us that, given the regulatory power and the wide latitude of "discretion" by the courts, the agencies will be sure to abuse and ignore the intent of Congress to make a law that is successful for both conservation of wildlife, and upholds the rights and freedoms of the people it affects.

In conclusion, while it has been a few days since I have seen the **Federal Register**, which, incidentally, arrives on my doorstep every morning, like all the rest of the regulated public, I don't think the Service has provided a 90-day finding yet, after having our petition for over 425 days.

Thank you.

[Statement of Dennis Hollingsworth may be found at end of hearing.]

Mr. POMBO. Thank you. Mrs. Chenoweth.

Mrs. CHENOWETH. Thank you, Mr. Chairman. And I take full responsibility for being the person that the Chairman was referring to that made the comment about the brown tree snake. I do want you to know that today Senator Murkowski is holding some hearings in the Senate with regards to what is going on in Guam, and apparently because the Federal Fish and Wildlife Service have not made a distinction between how it protects species where they currently exist and the use of singles species—single uses for a species where they would be preserved in their potential habitat—it has caused a great deal of problem in that the brown tree snake is the cause of the single use of the land in Guam at the Anderson Air Force Base which prevents the families of the Aguero [ph] families, the Castro families, and the Artirio [ph] families from even accessing their private properties. So maybe technically the snake has not been listed, however it is managed as being listed in that it prevents people from using their—having access to their own private property.

And I appreciate you, Mr. Chairman, for demanding accuracy in the Committee, and so I also wanted to take this time to be accurate in my own statements. So thank you.

Mr. Glitzenstein, your testimony was so well presented. I thank you for that. And I wanted to know what your philosophical view was with regards to the killing of any animal for any human purpose.

Mr. GLITZENSTEIN. Well, I don't know if I made this clear at the outset, but I just want you to understand that I represent a range of different kinds of organizations. I mean, I am happy to answer that personally, but I will not be speaking on behalf of the Fund for Animals because I don't work for the Fund for Animals. I have my own law firm, it is a public interest law firm. We represent ev-

erybody from animal welfare groups to environmental groups to journalists.

So I just want to make sure you don't see what I am going to say as in any way purporting to represent some general sense of what the Fund for Animals would say. If you want to know that, I think you should go to Heidi Prescott, who is the National Director of the Fund for Animals, or Cleveland Amory, who is the President of that organization.

My personal view is that there are situations where this society can take obvious steps to stop abuses of animals that we haven't taken yet. There are other situations which are far more complicated. I think that as a society we would do best to address the clear abuses that are going on today, things that we don't need to be doing and there is no societal interest in doing.

I mean, I will give you one example, an issue that my firm has spent some time working on in the hunting arena, something called canned hunts, which is a situation where people take an animal, frequently an endangered species, put it in a small area—there has been some incredibly graphic footage on the nightly news on some of these things—an enclosure no larger than the size of this room, release wild dogs, go and shoot that animal from point blank range after it's ripped to shreds by wild dogs.

Personally, I see no societal benefit in that kind of activity taking place. My own view, and again that is all I can speak to, is that we can do a lot in our society by stopping the abuse of animals in situations where 98 percent of the public would agree we don't need to be doing that, and put off for another day those issues which I think are the ones that, unfortunately, the press and a lot of folks focus on, which are the more contentious ones like biomedical research, which in my own mind I am still thinking through. I think we can wait for some of those issues and first get at the obvious places where we don't need to be treating animals the way we do in a lot of situations. That is my own personal philosophy.

Mrs. CHENOWETH. But even though you testified on behalf of the Fund for Animals, you don't know what their policy would be with regards to the slaying of an animal for a human purpose?

Mr. GLITZENSTEIN. If you want me to say what the Fund for Animals position is, the Fund for Animals is essentially an anti-hunting organization. It does not believe in sport hunting. It was originally started, I think, largely with the philosophy that we should extend legal protections to animals. It largely works on wildlife-related issues. It does not, as I understand it, generally take a stand, at least in the same kind of public way, on a host of other issues. But it believes in protecting animals and protecting wildlife, and that is its philosophy.

Mrs. CHENOWETH. I see. I asked that question because last weekend as I was leaving to go back to Idaho I met the man who is the AIDS activist who received a transplant from a baboon, and I was amazed to see him. He looks terrific. His color is good. His skin aura is very good, and yet he said that the animal rights activists were marching and shouting against him for having received the organ of a baboon. And I just, you know, I think that is a breakthrough. And I just wondered where your organization stood there,

because I think there are certainly times when we—animals can benefit humankind, even people who like a good pheasant dinner. I certainly do.

Mr. GLITZENSTEIN. And I think everybody obviously has different views on those subjects. I should say I have represented AIDS activists, people with AIDS in various contexts as well, so I would be the last person to say I am not sympathetic to the plight of that individual. Again, I think it is unfortunate that as a society right now when we come to these kinds of issues, how should we treat animals, we tend to focus on the ones that are the sexiest news stories. And there are a lot of ways we can treat animals better that I think 98 percent of the public would agree with before we get to what do we do with somebody with AIDS. There are going to be people on the extreme fringes of both sides of that debate. And my own personal view and my recommendation, and I can't speak for the organization on that issue, because that is not what I am here for, is that our society should focus on the issues where we can get general consensus on how to treat animals before we get to some of these more difficult problems that you may be talking about.

Mrs. CHENOWETH. Thank you. And, Mr. Chairman, I just wanted to ask Mr. Hollingsworth one quick question if I might.

Mr. Hollingsworth, you have been—you come from an area where the Fish and Wildlife Service has introduced programs under the Section 10J program.

Mr. HOLLINGSWORTH. Yes, 10A.

Mrs. CHENOWETH. 10A?

Mr. HOLLINGSWORTH. Yes.

Mrs. CHENOWETH. OK, thank you. How has that worked down in your area?

Mr. HOLLINGSWORTH. Well, in our opinion it has been a disaster. It was sold to the public as a solution for the listing of the Stephens' kangaroo rat that would provide a balance of allowing people to move ahead with the use of their lands if they had economic plans, and in the end after the Section 10A permit was signed, which creates a habitat conservation plan, the public was told that these reserves encompassed in the plan would be self contained, that there would be no more costs to the local area on this other than management of those lands, and there would be no more impacts on private property outside of those reserves.

What we got, however, after six years of what was supposed to be a two-year interim program, was a plan that cost our local county over $126 million all from our county, according to a letter from our Board of Supervisors to our Congressional representatives, and cost the private sector over $30 million just in mitigation fees alone, not nearly a dime of which has come from the Federal Government to help implement this program. But we also got in that plan an HCP that has reserves that have buffer areas, impacts on private property to the value and the use of those, downzoning private property without compensation around these reserves, and an ongoing acquisition program of lands that throws a cloud over everybody's property near these reserves as to what may happen down the road with their uses and their marketability.

People are just left in limbo, and I think the public was sold a bill of goods on what would happen with this HCP.

In fact, I think the HCP is not the way to go, because it simply intensified all these affects that come from the listing, because if your property is an area that—like, for example, we had the study areas that caused all the problems with the fire and the Domenigonis being stopped from farming. The rest of the property owners know about that and they know that they are targeted and they then want to make darn sure that there is absolutely no reason that they could be stopped and so they make sure that there is no habitat for endangered species on their property. And so it is a terrible, perverse incentive that is focused by these plans.

Mrs. CHENOWETH. Mr. Hollingsworth, in Idaho the Service is working with some of our people in Northern Idaho to bring the grizzly bear in under a Section 10A plan, and they have been told—they being some of my constituents in Northern Idaho, that this is the first time that this kind of plan has been proposed. Weren't you told similar things?

Mr. HOLLINGSWORTH. Well, we were told that we were certainly one of the first HCPs, but the major difference between the kangaroo rat and the grizzly bear is they didn't need any reintroduction, as I pointed out in my testimony. I think we uncovered that these kangaroo rats are certainly very plentiful. In fact, there are probably too many of them, but we were told that our HCP was probably at that time one of the largest and most complicated to ever be attempted under the Endangered Species Act. And I think its experience has proved—and as much as other areas, particularly in California, say that they are not going to repeat the mistakes that were made in Riverside County with the k-rat HCP, but I think that experience has proved that Section 10A and the HCP process were not designed for giant regional plans with thousands of landowners of large and small sizes. They were designed for an individual landowner who had a problem who was going to do a development activity where he could afford to dedicate part of his property over for conservation of these species without a giant economic impact.

Mrs. CHENOWETH. I appreciate your answer. Thank you very much.

Mr. HOLLINGSWORTH. Thank you.

Mr. POMBO. Thank you. Mr. Paulson, in your testimony you talked about the fact that there was a second study that was not included or was not paid attention to. Can you elaborate on that?

Mr. PAULSON. Yes. Before I elaborate on that, I just want to make one point to Congressman Chenoweth, and that is the general counsel that tried to answer your question regarding standing. In Williamson County, Texas, county commissioners filed a suit in court regarding economic harm, regarding a delisting petition, and the position of the Justice Department was that they did not have standing and the county commissioners lost that particular lawsuit because of that. So I am curious as to the inability of the counsel to not tell you about their position in court regarding the Williamson County lawsuit.

I will go back to the question at hand. Dr. Robert Benson is a very esteemed physicist and birder who deals with noise and its impact on environment. Dr. Benson was commissioned by Fish and Wildlife through the Section 6 money to go out and ground truth

the assumptions by Wahl. Wahl had made these assumptions that habitat was being eliminated in Texas over a period of time and the reason for that loss. He also made the assumption that fragmentation of larger patches of habitat down to smaller, less then 50 hectares let us say, patches would allow the warblers to occupy those particular patches of habitat. So when Wahl made his assumption on the amount of habitat that was actually out in Texas, he eliminated all patches less than what is 50 hectares, basically 123.5 acres. Through this assumption he was able to minimize the amount of habitat that was out there in his assessment.

Benson, in his ground truthing, was able to find birds in 10 to 15 acres, patches of land, calling into question Wakl's assumption. And if you take the 123.5, or the 50 hectares, down to, say, just a 50 acre assumption of what would be an occupied warbler habitat, then take the estimates of what Wahl did as far as numbers of bird per acre, you would increase the population estimates for warblers from four to 16,000 nesting pair to as high as 36 to 50,000 nesting pair. Changing that one assumption through actual ground truthing could recover the species.

Dr. Benson turned that information in in May of 1990. That is when the warbler was emergency listed. In late November of 1990, that information came into my possession, and nobody in the impacted community knew about it at all. It actually came about when a commissioner from the Texas Parks and Wildlife Department at a commission meeting asked the head of the Nature Conservancy if he was aware of the second status report for the Golden-cheeked warbler. He said he was aware of that report. Up until that time, no one in the impacted community had even heard about the study.

Mr. POMBO. It is your opinion that this second study was ignored by Fish and Wildlife, that it was not used?

Mr. PAULSON. It is still in draft form and I am told by Fish and Wildlife that it is not used today, even though Fish and Wildlife has changed the assumptions by Wahl—which describes minimum patch size as 50 hectares—down to anywhere from 20 to 30 acres if you are a landowner and you have the suitable habitat. And until you prove otherwise, it is still occupied habitat. But they have not readjusted any of their figures regarding habitat in total for the range of the warbler.

Mr. POMBO. I am familiar with at least one parcel in that area that was as small as 15 acres that was considered potential habitat.

Mr. PAULSON. Yes.

Mr. POMBO. But you have a second study that may call into question the science that was used on the original study, may call into question whether or not—what the listing status of the Golden-cheeked warbler should be. And it is your opinion and in everything that you have been able to find, you can't find anywhere where Fish and Wildlife compared those two or used those two or in a proper peer review fashion determined whether or not the first study that they used had used legitimate scientific principles?

Mr. PAULSON. Well, this was interesting, because after that information was released to the public, the individuals who were behind the listing got together and peer reviewed Dr. Benson's study. That

critique was very venomous and vicious, and they went after him in many different ways, leading Dr. Benson, who is a very good scholar, to remark in his responses, and I can provide that information at a later date, that he felt that there was a double standard being applied in his information, which he believed was valid, statistically valid.

Mr. POMBO. You also stated that in the process that you were not allowed to review the data that was presented until the listing actually happened.

Mr. PAULSON. Well, what happened was—let me step back here a second. This points out the problems with the listing process, that the impacted parties are not allowed to really review this information. There is not a cooperation between the Service and the landowners. Fish and Wildlife Service, from my memory of the West, used to be very cooperative to landowners, used to assist them in managing natural resources. It has only been in the last few years that they have taken on an antagonistic type of behavior to these landowners. It goes back to the problems that we face here. If we were allowing the public to be aware of this information and be able to review it, we would have good peer review. If we would be allowed, then, to be inclusive in the problems prior to the listing, we would have species that wouldn't even get to the list.

So to answer your question specifically, yes, we were precluded from reviewing that information prior to that. And even if our information had been reviewed, I believe it would fall on deaf ears.

Mr. POMBO. Mr. Rivett, I am much more familiar with the process that you have gone through with the fairy shrimp. You also had other biological data that was, for lack of a better term, ignored by Fish and Wildlife Service.

Mr. RIVETT. Yes, sir, that is correct. We had substantial data that was produced by our own biologist and his firm, Sugnet and Associates. In fact, he had put in a tremendous amount of work actually going out and surveying the various vernal pool populations up and down the valley. In fact, a great deal of his information was actually used, which is interesting, was actually used by the Service to make the determination that a fifth species, called the linderiella, would not be listed.

Now it was very hard for us to understand how the Service could take that information and rely upon it as valid scientific data to not list a species and then take a look at information developed the exact same way with regard to the other four species and essentially discard that information. It was discarded on the basis that the estimates made were overestimates.

Sugnet surveyed over 3000 vernal pools up and down the State and he came to some basic conclusions with regard to the populations. However, the final rule discounted those conclusions to a very great extent but never told us why. It merely said that these were overestimates of population and came back with the conclusion that the reason why there weren't nearly as many vernal pools and as much habitat available is because Mr. Sugnet had not evaluated for vernal pool complexes. This was a terminology which hadn't been used before. And so essentially the Service reached the conclusion that when you found one pool with maybe 800,000 species, that didn't necessarily mean that that was one habitat. You

looked at other pools and they started combining pools. And by combining pools here and pools there they came up with a very small—well, it still wasn't that small, but with a smaller population. It is very creative.

We have looked carefully at the populations and at the locations and the data points. And you find fairy shrimp basically every place up and down the valley where there is free standing water. And I am not being facetious when I say that. You can find fairy shrimp in tire ruts. You find fairy shrimp in old, discarded tires. You find fairy shrimp anyplace that there is an impermeable layer of soil and the water stands waiting to evaporate.

I have shown this picture before. This is a picture of fairy shrimp habitat. I wish you could see it, but it is a picture of an old drainage ditch with lots of discarded rubbish in it. And there is another picture here of a similar location. There are four or five pages here, which I could submit as well, which are fairy shrimp habitat.

[The information may be found at end of hearing.]

Mr. RIVETT. The point to be made is that there are many examples of habitat within this 200 by 400-mile habitat range. They are found every place. And unfortunately, as I indicated previously, it became very clear that the purpose of the Service was not to really identify where that habitat was, where the viable habitat was, and whether there are threats to it, but was to control the land where that habitat was found.

Certainly that is the experience that we had when we tried to actually go out and do additional survey work and were met with additional requirements with regard to our surveys to where they became actually impossible to do. We were told that where we wanted to do the survey work wasn't going to help the Service amend its listings, yet they wouldn't tell us why where we were doing the survey work wouldn't help them. So we were basically confused, and the Service refused to enlighten us.

Mr. POMBO. Were you provided with all of the data that they used to list it before it was listed?

Mr. RIVETT. We didn't have everything. No, of course we didn't have everything. In fact, I am still trying to get everything through FOIA requests at this point.

Mr. POMBO. You still have not received all of the information?

Mr. RIVETT. We have received the record. We have received the record that was utilized for the listing and for the final rule. We have received that record. We received it in unorganized fashion, but we have gone through that. We have received the record, but there is a lot of additional information that has come forward since the listing because of the consultation process itself. We would like to get that information to augment our delisting petition. We have had a very difficult time getting that information.

Mr. POMBO. What were you told by the Service when you filed the delisting petition? Were you told that they would look at it and give you an answer?

Mr. RIVETT. Well, when we filed the delisting petition, the moratorium was in existence. We were told at that time that they would look at it, but they couldn't tell us when they would get back to us with any kind of an answer. After that, we met with folks at Interior. We also met with Deputy Secretary Garamendi, who es-

sentially told us that nothing was going to happen, that it would be illegal for any department personnel to even pick up the petition, so to speak, and do any work on it. He said our only recourse was to lobby Congress for a full funding of the Act and then the Service would be able to get to the delisting petition. Of course, that is not the case. Delisting has been placed as the very lowest priority issue for the Service at this point.

Mr. POMBO. Mr. Glitzenstein, in your prepared testimony, you have one portion here that deals with peer review. And to paraphrase what you have here, because I don't want to read the whole thing, but you say that it would unnecessarily slow down the process to demand peer review on every listing. And I believe that that is an accurate reflection of what you have here. Having heard your fellow panelists talk about three specific issues where I believe that if peer review had been used that we would not be talking about this today, do you still feel that peer review is unnecessary?

Mr. GLITZENSTEIN. Well, again, I—just to be clear about my point, I wasn't saying that peer review is unnecessary in any particular instance. What I was addressing was a Congressional mandate for peer review on each listing decision, which I think you would actually have to consistently, I believe perhaps these gentlemen would agree too, apply to delisting petitions as well.

Mr. POMBO. I would insist it then as well.

mr. GLITZENSTEIN. Right. But that kind of Congressional mandate, I don't believe, is adequately supported by the entire experience with the listing process, that certainly the Fish and Wildlife Service and the Interior Secretary should have the tools and perhaps criteria could be established for when those tools would be applied through a regulatory system as to when there is the kind of controversy that requires some additional peer review. But at the same time, I think there are some decisions that you will look at which are so clear that it makes no sense to say you must go and get outside experts in, which is costly. We are all talking about saving money and this is not a free process. When you go out and you get three outside experts from the National Academy of Sciences, bring them to Washington, have them collaborate, that is a costly process. There are some listing situations which are so clear that to say that there has to be peer review in every situation—there will be delisting petitions which are that clear as well—I would submit, that a mandate for peer review would make no sense.

Let me give you an example. In our testimony we talked about the Alabama sturgeon. This is a species which the Service said it was not going to list, and I would submit on flagrantly political grounds, because it was extinct, even though one of the members of that species had been pulled out of the Alabama River a year earlier. And six months after the decision that it was "extinct" another Alabama sturgeon was pulled out of the same spot of the same river. Now that species still isn't protected. And I would submit under those circumstances to say we need peer review before we decide whether that species is extinct just is not the kind of Congressional micro management of the system which is in anyone's interest. I think encouraging peer review in appropriate circumstances makes sense, but as to requiring it across the board, I stand by what I said there. I do not believe that a legislative

mandate in every situation involving a listing decision is justified by the entire experience with this program.

Mr. POMBO. I would disagree with you. And so you understand where I am coming from on this, I don't know where the next fairy shrimp or the Golden-cheeked warbler or the Stephens' kangaroo rat is, and the way that it currently operates, the Fish and Wildlife Service claims that they do peer review of their decisions. That is highly debateable in the scientific community. In fact, I talked to a government scientist the other day who runs one of the agencies who told me that peer review is in the eye of the beholder. You can call it whatever you want, but there should be some criteria for listing. But what the Service is capable of doing today is listing something like the fairy shrimp with biological data that every scientific magazine that is printed in this country would refuse to print because it has not been peer reviewed, and yet we can list it based on that same data, have the kind of social and economic disruption that we have had because of that listing and have absolutely no peer review and have absolutely no oversight whatsoever. Now I will agree with you 100 percent that it is laughable to say that these decisions aren't political on both sides. They list stuff because it achieves their goal. The don't list stuff because it would hurt them. And I have had people in the Service tell me that decisions were made not to list something because of a certain political decision or political backlash that would occur because of that. And I agree with you completely on that, but the only way around that is to use good science. What we are doing right now cannot be called good science.

Mr. GLITZENSTEIN. I think you make a good point, and just to clarify again, Section 4 of the Act already says they are supposed to base decisions on the best available biological data. So that is an existing mandate and I think your point that peer review is in the eye of the beholder is well taken. Certainly they have to go out and look at the available scientific studies. I think you have to make a distinction between looking at the available literature as it currently exists and going through a new process of calling in new scientists, sitting them down, saying "what do you think about that literature." So I think we do have to make some of those distinctions, but I fully agree that if the Service makes a decision which is not supported by the science, it should be called on the carpet for that, however it makes that decision. And I for one, for example, think that folks whose economic interests are harmed by a decision which is arbitrary or illegal should have the right to go to court just like my folks do and make their case to the court. And if they can demonstrate that in fact the decision is not biologically supportable, they should get relief from the court. And I for one would be perfectly happy to sit down and talk about any legislative fixes that would make sure that we all get equal access to the courts to make those cases, because judicial review is absolutely vital to keeping a check on an agency, no matter whose ox is gored by a particular decision.

Mr. POMBO. Well, I am glad to hear you say that, although I am a little hesitant because I believe that you and every other attorney in the audience would agree that everybody ought to be able to sue whoever they want. I am glad to hear you say that.

One question that I—and I realize I am way over time, but one question that I do want to broach with you, and it goes along the idea of good science. The lawsuit that said that they had to list 400 species over a period of time, and I believe that the settlement was 100 species a year that they had to list, where is the good science in setting an arbitrary number of species that must be listed.

Mr. GLITZENSTEIN. Well, first of all, that is not precisely what the settlement said, and I think this may help answer your question. We did not say they had to list all those species. What we said was that they had to take what they called their existing "candidate one" list, which are the candidates that the Fish and Wildlife Service biologists themselves had said we believe that there is probably sufficient evidence to list these species, and simply required, according to a biologically based priority system, that within four years that they would make decisions on whether to move forward with listing. And I should emphasize this point, because actually over the course of the last four years 100 of those species—actually I think it is more than 100. It is about 130 species as to which they published decisions in the **Federal Register** that they would not list. And I would submit that that reinforces the point I was trying to make earlier. It is a good thing when the Service says—I am not saying each and every one of those decisions I would agree with—but for the Service to say these were candidates, now we have decided they are not anymore, that that is good for the folks out there who are sitting waiting to find out what the Service would do, which the Federal Government is going to take jurisdiction.

Mr. POMBO. But on many of those, lawsuits were filed against the agency for making the decision not to list.

Mr. GLITZENSTEIN. Actually, I think of those 135 or so, I don't believe—I could be wrong about that—but I don't believe that there has been a legal challenge to any of those decisions not to list, which is not to say there won't be. Just like these gentlemen, and the people whose interests they represent, if we don't believe that a particular decision on one of the species was supportable, I am assuming you would agree that we should have every right to also go to court and make our case on that species.

Mr. POMBO. At this point would you not agree with me that courts are playing too great a role in the listing decision?

Mr. GLITZENSTEIN. Well, I think it is unfortunate that courts are playing the role they are. And in fact, that is exactly what our lawsuit was attempting to avoid. What we were attempting to say was "let us get some agreement on an overall timeframe within which the Service will make these decisions on a biological basis." We specifically incorporated the agency's own priority biological system and the Service could then use that in response to lawsuits to say, "well, look, we are making progress in making decisions, we are plowing through our backlog of species." And I think what has happened now, unfortunately, is that because of the breakdown of this process you have people running into court because they feel they have no options available to them either with regard to listing or delisting particular species. And I think all of us would probably agree, if we could get to a point of consensus, to get back to a system where they are making progress and making decisions on

everybody's petitions on a biological basis and that is really where we should get to.

And I just want to reinforce the point that Mr. Rivett made that a separate appropriation for delisting, I think, would be very wise. And, I know that money is scarce and money is tight, but I think one of the problems you have is you have the same people in charge of making these new decisions to protect species that are looking at recovery and looking at whether or not delisting of other species is appropriate. And I think separating those out is really one of the sensible ways of doing it, as long as you make sure that enough money is being devoted to each of them.

Mr. POMBO. But I would point out to you that, you know, we keep trying to segregate these issues. All of these different species that these gentlemen are talking about were filed—were the result of an action that was taken during—before Fish and Wildlife—before the moratorium was put in place, were all results of many years before that happened. And, when the moratorium was put in place, it was exactly because of issues like this that somebody said, you have got to put a stop sign up here and revise the law so that we don't have to keep coming back and doing this. If we don't revise this law, this isn't going to quit. The listing and delisting process is going to become more and more politicized. And I don't think any of us want that, but that is exactly what is happening. It is becoming more and more politicized with every decision to list or not to list. The recent decision on the Red Lake frog in California, that is listed as a threatened species and I read somewhere that they estimated there were 350 of them left and it is listed as a threatened species. And in one of his mud puddles he has 800,000 fairy shrimp and it is endangered and he has got over a million acres of that. I mean, these decisions aren't based on good science. And, you know, regardless of what somebody can put together as a report on how great the science is, I think it is all based on politics. And we have to change the law or else we are just going to be back in here next year and the year after that. Mr. Hollingsworth has been working on this for years. I mean, he has been coming to see me for years on this and nothing happens.

Mrs. Chenoweth, did you have any follow-up questions?

Mrs. CHENOWETH. No, Mr. Chairman.

Mr. POMBO. Well, I would like to thank you for having the patience and the stamina to hang with us here. I appreciate the testimony and the answering of the questions and would tell you that there may be further questions. I know the Chairman of the Committee was unable to be here, but he did have questions he wanted to ask, so he will submit those to you in writing. And the record will be held open on the hearing to give you sufficient time to answer those questions. And if you would do that in a timely manner, I would appreciate it. Thank you very much.

The hearing is adjourned.

[Whereupon, at 2:15 p.m., the Subcommittee was adjourned; and the following was submitted for the record:]

SENATOR TEEL BIVINS
DISTRICT 31

COMMITTEES:
Finance
Education
Natural Resources
Sub Committee on Agriculture
Chair, Nominations

The Senate of
The State of Texas

June 17, 1996

DISTRICT OFFICE
P.O. Box 9155
Amarillo, Texas 79105
(806) 374-9994
FAX (806) 374-3007

P.O. Box 1673
Midland, Texas 79702
(915) 682-0455
FAX (915) 684-7843

CAPITOL STATION
P.O. Box 12068
Austin, Texas 78711
512) 463-0131
FAX (512) 475-3733
TDD (512) 475-3758

U.S. House of Representatives
Committee on Resources
Washington, D.C. 20515

Mr. Chairman and Members,

Thank you for the opportunity to present my thoughts on the reauthorization of the Endangered Species Act (ESA), in general and as it directly impacts the Texas Panhandle. "As ecologists see it, the greatest threat to bio-diversity is the success of one species, our own." This statement was made by Stewart Pimm, an ecologist at the University of Tennessee. I think it sums up in one sentence the impossible situation that is created by continuing to enforce the ESA in its current form.

As of 1996, some 962 domestic and 562 foreign species have been listed as endangered or threatened. However, only 24 species or 1.6 percent have been de-listed. If we continue adding species to the Endangered Species list with the attendant restrictions on land use and critical habitat designation, we will paint ourselves into on inescapable corner. The sad truth is our efforts at protecting species and ultimately de-listing them has not kept pace with our ability to find new species to list.

Some experts project that total species listed will increase to over 3000 in the coming years. If this occurs with no change in the law, the inevitable conflicts that result from limits placed on land use that result from designation, or worse yet designation of critical habitat, will expand at a comparable rate. The fact is our government has neither the capability nor resources to enforce the ESA. I do not believe the authors of the ESA could have foreseen the explosion of listings and proposed listings that has occurred. Therefore, Mr. Chairman, I applaud your attempts to reform the ESA.

As a legislator, I know that the answers to the issue this committee is wrestling with lie somewhere between environmental purism and absolute private property rights. We simply have to inject an element of common sense into reforming the ESA. I have attached a proposal developed by the Texas Parks and Wildlife Department in conjunction with the Texas Department of Agriculture, Farm Bureau, and Texas Wildlife Association. I submit this thoughtful proposal for your consideration. In particular, I suggest the ESA should be changed to move from individual species protection to more of a focus on habitats and ecosystems. Priority for funds and other resources should be given to multi-species ecosystem situations to maximize effectiveness. This will prove to be a more cost effective approach and, if done carefully, will provide for both conservation and sustainable use of resources on private lands. Recovery plans should be written for clusters of species and/or entire ecosystems.

One unique feature of this proposal would be the de-coupling of listing and enforcement. The idea would be for U.S. Fish and Wildlife (USFW) to continue the listing process based on solid peer review science while the states would be responsible for developing recovery plans for these species, clusters of species, or entire ecosystems. One of the central elements of the plan is that the states become partners with the Federal Government in achieving the goals of the Act. This element is sorely lacking under the existing ESA.

In addition to the proposal made by Texas Parks and Wildlife, I believe it is critical that the re-authorized ESA mandate minimum scientific standards for listing decisions and require that such decisions be peer reviewed by qualified scientists. Under current law, the listing process can be initiated by a bored, housewife in South Dakota or a sixth grade science project in South Texas. Because of the enormous consequences of listing under current law, it has become critically important that the process not be initiated unless there is a sound scientific basis.

A final general comment I would make is that USFW in enforcing the ESA does not appear to distinguish between species that are just plain rare, like the Texas Blind Salamander, and those that once flourished, but are now substantially diminished. Recognizing this fact could take some of the edge off the enforcement of the ESA.

Among other areas of West Texas, I represent the Texas Panhandle in the State Senate. My family has owned and operated a ranch on the Canadian River North of Amarillo for four generations. During the last two years, USFW has proposed two species be added to the Endangered Species list that inhabit our area. In 1994, USFW proposed listing the Swift Fox. Then in 1995, the Arkansas River Shiner was proposed for listing.

One issue that immediately presents itself regarding these listings is the lack of communication between USFW and comparable state agencies. The Texas Parks and Wildlife Department learned of both of these proposed listings from reading newspaper articles. Unbelievably, the Texas State Administrator for USFW apparently learned of the proposed listing of the Arkansas River Shiner from newspapers rather than through communications within his agency. More over, USFW never looked at any state data before publishing the proposed listing. Even more importantly, they did not seek any state data after the species were proposed for listing other than in the required public hearings held in the area.

Both of the proposed listings sent shock waves through the Texas Panhandle. The mere proposal for listing had immediate negative impact on farm and ranch real estate values. Some 400 Panhandle residents showed up at a public hearing in late January of 1995 regarding the proposed listing of the Arkansas River Shiner. There was not one person who spoke in favor of the listing. For farmers and ranchers in the Texas Panhandle there is no apparent upside for listing a species. The only consequences of listing a species are negative. It was fear of land and water use limitation that drove so many people to attend the meeting.

The proposed listing of the Arkansas River Shiner provides a great example why people across America are frustrated with the ESA and its enforcement. The materials clearly indicate that there is a thriving population of Arkansas River Shiners in the Pecos River in New Mexico. However, USFW chooses to ignore this population since they are not indigenous to the Pecos River and, in fact, were stocked there some 25 years ago. Even more incredible, USFW scientists have proposed elimination of the Arkansas River Shiner in the Pecos River because of potential damage they are causing to another Shiner species, the Red River Shiner.

While the Arkansas River Shiner and the Red River Shiner may in fact be different species, even trained scientists have a hard time telling them apart. It is this type of scientific hair splitting, that carries with it huge risks of land use limitation, that causes additional frustration on the part of those who are saddled with the application of this act.

One of the lessons we have learned in Texas is that a terrestrial endangered species is bad, but an aquatic endangered species is even worse. The land use restrictions associated with the terrestrial endangered species are difficult and cumbersome. If one is unfortunate enough to have land that is designated critical habitat, the land use restrictions can become insurmountable. With an aquatic endangered species, there is an additional and potentially more critical downside risk. That is in order to protect the species USFW may decide landowners must limit there use of surface and ground water. This can have devastating impacts on the landowner.

With regard to the Arkansas River Shiner, USFW has suggested that a recovery plan may require limitation on pumping of water from the Ogallala Aquifer. This aquifer is literally the life blood of production agriculture in the Panhandle. Limitations on pumping could take some farm land and reduce its value by 80 percent. This is why people shudder when you even mention the potential of an aquatic endangered species in their area.

The Swift Fox was not listed as an endangered because Texas and its neighboring states opposed the listing. Rather the department allowed the states to create an interstate Swift Fox conservation strategy instead of adding the species to the list. Texas Parks and Wildlife officials play a key role in this interstate group and are optimistic about preservation plans for the Swift Fox.

The proposed listing for the Arkansas River Shiner was interrupted by the Congressional moratorium on new listings. Now that this moratorium has been lifted we are once again in jeopardy of having this species listed. The people of the Texas Panhandle were very hopeful that Congress could rewrite the ESA during this moratorium. That did not occur. My constituents and I urge you and your colleagues to adopt common sense reforms to the ESA.

I know that this is a controversial issue that the leadership has pulled off the radar screen at least for the time being. But the problems surrounding the continuation of the ESA as written will only get worse. As a rancher who inherited a ranch, I believe I have an obligation to leave it to my children in better condition than I received it. Likewise we as Americans have a similar obligation for our children and grandchildren. We'll never be able to meet this obligation unless our laws reflect good science and common sense.

Thank you very much for the opportunity to testify before you today.

TB/aed

AMENDMENTS AND CHANGES TO THE FEDERAL ENDANGERED SPECIES ACT

A Position Paper

June 1995

Presented by:

Texas Department of Agriculture
Rick Perry, Commissioner
Champion International Corporation
Texas Agricultural Extension Service
Texas Farm Bureau
Texas Logging Council
Texas Sheep and Goat Raisers' Association
Texas and Southwestern Cattle Raisers' Association
Texas Wildlife Association
U.S. Natural Resources Conservation Service

Table of Contents

Amendments and Changes to the Federal Endangered Species Act -

A POSITION PAPER - JUNE 1995

Introduction

The goals of the federal Endangered Species Act (ESA) are worthy of support. However, the issues and concerns raised about the ESA and its implementation in Texas and other states make it clear improvements must be made if the original intent of the law is to be met. The debate over reauthorization ranges from abolition of the ESA to proposing stronger provisions for it.

In response to the ongoing debate, the Texas agriculture community formed an informal working group to suggest changes to the ESA. Members of this group represent Champion International Corporation, Texas Agricultural Extension Service, Texas Department of Agriculture, Texas Farm Bureau, Texas Logging Council, Texas Parks and Wildlife Department, Texas Sheep and Goat Raisers' Association, Texas and Southwestern Cattle Raisers' Association, Texas Wildlife Association and U.S. Natural Resources Conservation Service. The working group, representing nongovernmental entities as well as state and federal agencies, has reached general agreement on the principles and concepts embodied in this position paper.

These ideas reflect years of on-the-ground experience in dealing with the ESA, as well as observations of what has — and has not — worked. Some of the ideas were derived from a similar document being prepared by the Western Governors' Association. The principle that forms the backdrop for these recommendations is as follows: *in order to meet our conservation responsibilities and serve the conservation demands of the public, government conservation agencies must make conservation in rural communities and with private landowners easier.* These principles emphasize accountability, practicality and providing conservation services, rather than emphasizing regulations. Regardless of its final form, any revision of the ESA should include consideration of these ideas if the original intent of the ESA is to be realized.

Listing Moratorium

Congress is expected to consider a moratorium on the listing of species. A moratorium will allow United States Fish and Wildlife Service (USFWS) biologists to return their focus to recovery actions for species already listed but neglected because of limited resources, and would allow for more considered debate about reauthorization. The USFWS has been mired in a court-mandated process (listing) over the last several years that has, for the most part, yielded little positive conservation action for newly listed species and, because of the conflict generated, has eroded support for the ESA's original intent. A listing moratorium would also allow people constructive reauthorization – a process within which the following ideas should be given careful consideration.

Statement of Purpose

Any ESA reauthorization requires a preamble that clearly states Congress' intent to provide for and protect endangered species. It must be clear that the ESA is neither a tool for land use control, a means to stop urban growth nor the principal tool to resolve other environmental issues. Those issues must be addressed separately and on their own merit.

Importance of State Programs

ESA revisions must recognize the states' preeminent authority over fish, wildlife and plants within their trust responsibilities. For candidate and listed species, states must be able to choose to assume responsibility, or at least full partnership, with implementation of the Act. States should be provided full funding to participate in all aspects of the ESA. Additionally, the Secretary of the Interior must be able to suspend consequences of a listing decision when states develop conservation plans to protect species and their habitat. When states choose to assume ESA responsibility, the decoupling principle (described later) would allow states similar latitude to determine necessary conservation action. The importance of state involvement in other aspects of the ESA is presented in other parts of this document.

FACA Constraints

All ESA related actions to list or delist species, develop recovery plans, engage in Section 7 consultations and Section 10 planning should be exempted from Federal Advisory Committee Act (FACA) and require consultation with the state wildlife agency. FACA has been both an impediment and an excuse for not involving states in decision-making processes of the ESA.

Funding State Assumption of ESA Activities

Federal funding should be provided to states that assume a greater role under the Act. States should receive approximately the same amount that the USFWS would have received for the same services. Federal appropriations, including those associated with Section 6 of the Act, should be distributed to these states in the form of block grants. The Land and Water Conservation Fund could provide additional funds to the states for landowner incentives and species recovery.

Private Landowner Rights

One of the most important factors impeding progress in understanding the true status, and therefore potential for delisting, of species in Texas, is rural landowners' fear of sharing information with government agencies. This fear is based on the presumption that the data will be used to regulate their land use practices and, therefore, compromise property rights. If the following suggestions concerning incentives, technical assistance and regulations are guaranteed through reauthorization of the Act, perhaps this fear would be diminished. It may, however, be necessary to

pass additional legislation that would protect landowners from the use of data gathered from their land to prosecute them for violations of the Act. It should be a part of the ESA that biologists shall not enter private land to gather information concerning rare species without the landowner's consent. Each landowner should be able to easily access and challenge data on rare species obtained from his/her property. The importance of protecting property rights and providing for meaningful input from landowners in other aspects of the ESA is presented in other sections of this document.

Private landowner and local community involvement is now recognized worldwide as an essential component of success in conservation. Nowhere in the world is this more crucial than in rural Texas. In order to be actively involved, landowners and local communities should be empowered with accurate, accessible information and practical conservation tools, which will facilitate combining technical information and political judgment to achieve desired conservation and social goals. That is the best and most effective way to assure both conservation and property rights.

Rural Landowner Incentives

There must be positive incentives and simple procedures to increase the participation of rural landowners in protecting endangered species. Possible incentives include three main categories: tax incentives, farm programs and technical assistance.

Tax Incentives

One of the most effective ways to improve conservation would be to offer ESA inheritance and income tax breaks for landowners who make a commitment to conserve endangered resources, make efforts to conserve rare species to avoid the need to list them, maintain land as native habitat or create habitat for rare species. Inheritance tax laws should be changed to prevent the often necessary fragmentation of farms and ranches, and therefore habitat, to meet tax demands. Short term incentives, such as cash payments, rents or income tax deductions are subject to annual budget constraints, but may be an effective incentive for smaller landowners. These tax changes would be insignificant within the context of the overall federal budget and would shift the financial burden for conserving rare species, which are in the public trust, from the individual landowner to a broader public base of conservation supporters. Inheritance tax relief would result in better long-term species and habitat management and would change private landowners' attitudes toward endangered species in general.

Farm Programs

Changes in farm programs could allow for the opportunity and funds to conserve habitat. The Conservation Reserve Program is one example in which the creation or restoration of rare species habitat could be a priority while still meeting the program's original goals at no additional cost.

Technical Assistance

While most people think only of the programs mentioned above when considering the role of incentives in the ESA, it is not so limited. Technical assistance, in the form of information and education, is also a powerful incentive to promote conservation. The vast majority of people, especially those from rural and agricultural backgrounds, want to support conservation but simply do not know what they need to do. As an example of how technical assistance can serve landowners consider a program whereby landowners voluntarily request a rare species review of their property to gain information on current management and its effect on endangered species. Recommendations and discussions would remain privileged information and landowners could not be prosecuted. If this silent majority could be motivated through education, it would be the most effective conservation strategy by far. Mechanisms must be developed and incorporated into the ESA to foster this objective.

Facilitating Conservation Options

Several specific sections of the ESA should be modified to better promote conservation through cooperation with private landowners. Expansion of Section 6 programs, cooperative efforts with state agencies and programs like the Agricultural Extension Service must be pursued and enhanced. Sections 10 and 4 of the Act need to be amended (or their implementations changed) and funds redirected to promote, not just permit, these planning activities. The ESA needs to empower states to facilitate the development of conservation planning efforts by local communities. This would lead to more effective conservation on private lands where most of the rare resources have been conserved because it will be the landowners themselves who initiate and guide the process. There must be more options than just a Section 10a permit or Section 7 consultation to allow for incidental take.

There should be additional options directed at rural and agricultural landowners who wish to work together or individually to meet ESA requirements. These landowners need more diverse and accessible tools than those now in the ESA. Modified versions of Habitat Conservation Plans, conservation easements, conservation laws and wildlife management plans should be developed. New tools like Cooperative Conservation Plans or Agricultural Conservation Plans have been proposed as such tools and should be pursued as a means of simplifying conservation on agriculturally dominated landscapes. Market-based opportunities like the Transferable Endangered Species Certificates and Transferable Habitat Certificates should be promoted as additional practical solutions.

Landowners who enter into wildlife management plans to enhance and restore habitat and ecosystem functions on their land should be exempt from future ESA restrictions if they need to return the land to its previous state of production or its prior condition. This process would be similar to that currently used for wetlands under a nationwide 27 permit issued by the Army Corps of Engineers.

USFWS does not have the resources to adequately assist in developing such options. State fish and game agencies do, especially in partnership with the Agricultural Extension Service and Natural Resource Conservation Service. The USFWS need not duplicate such efforts, only fund and empower already existing and functional organizations to achieve the goals of the Act. Provisions to support this expanded state role should be included in reauthorization of the Act.

Habitat/Ecosystem Approach

The Act's focus should be changed from individual species protection to a broader focus on habitats and ecosystems. Priority for funds and other resources should be given to multi-species/ecosystem situations to maximize effectiveness. This will be more cost-effective and, if done carefully, provide for both conservation and sustainable use of resources on private lands. Recovery plans (see below) should be written for clusters of species and/or entire ecosystems. Planners, however, need to recognize the realities of political and private landowner boundaries in their planning efforts.

Proactive Approach

A habitat/ecosystem approach also will provide preventive management for some species before they start to decline. The Act should also be changed so that a greater, but nonregulatory, emphasis can be placed on species, such as candidates for listing, before they become seriously endangered. Incentives should allow states to take such positive actions. Proactive habitat planning should be encouraged for entire ecosystems.

Listing, Conservation Priorities and Regulations

Listing

People are concerned about the current listing process because regulatory and economic consequences hinge on the outcome of listing, financial and political realities influence the process, and some listings appear unwarranted. The listing process should be "decoupled" from the regulatory actions that are automatically invoked now. An initial proposal for a *Decoupling Principle,* what it might include and how it would work is attached. The Act should be amended so that the list is a tool to objectively inform the public about species perceived to be at various levels of risk from a biological perspective. Being on the list should not guarantee the species any certain type of regulatory protection or funds for study or recovery. Biological information, including status, distribution and threats is the only type of information that would be used to place or remove species from this list. Consequently, biologists would be accountable for the data used to place species on the list. This would decrease the incentive — perceived or real — to list or not list species for reasons other than biology.

More rigorous listing standards placing a greater burden on the petitioner to use the best verifiable science to propose a species for listing need to be developed. All petitions also would

have to be exposed to an independent, objective, scientific peer review that would include participation by affected states. State determination on listing is presumed to be correct.

Categories of Endangerment

There is currently a great deal of disparity among species in the categories of endangerment to which they are assigned. For instance, Mexican spotted owls are considered threatened with about 900 pairs, whereas golden-cheeked warblers, with 4,000-17,000 pairs, and whooping cranes, with about 150 individuals in the wild, are both endangered. The public is justifiably concerned and confused. New categories of endangerment beyond threatened and endangered need to be refined and standardized. New categories could include such names as extremely endangered, endangered, threatened, sensitive and uncertain. Criteria for these categories should include overall population size, taxonomic distinctiveness, distribution, certain ecological factors such as reproductive potential and degrees of threat. The Act needs to clarify the relative importance of conserving rare species, subspecies and distinct populations. These criteria would become the basis for establishing categories for which levels of protection and funding would be developed.

Conservation Actions: State Responsibilities

Society must choose how to invest resources to assure conservation of rare species. Acknowledging that we do not currently, nor will we in the foreseeable future, have enough funds to recover all species simultaneously, decision-makers need to develop criteria that will facilitate the hard conservation decisions that must be made. As currently implemented, there is little accountability or uniformity in how these decisions are made. Decoupling regulations from listing and moving the conservation decision-making responsibility to the state level are ways to assure accountability and greater participation by stakeholders.

States must have the opportunity to assume appropriate responsibility for implementing the ESA. Federal funds would be provided to states according to a formula based on numbers of listed species present in the state and their levels of endangerment, similar to the process used for distributing Section 6 funds. Essentially, a block grant approach would be developed to facilitate state assumption of ESA responsibilities within a set of federal guidelines.

Under the decoupling scenario, the USWFS, in consultation with states as described, would make listing decisions and determine the category of endangerment for candidate species. These decisions would be strictly based on biological issues. Responsibility for determining and implementing conservation actions would fall to states if they choose to assume that responsibility.

USFWS, in consultation with states, would establish broad guidelines for appropriate conservation action. Those guidelines would be based on levels of endangerment, multi-state and/or international distribution of a species and related considerations. A state's failure to take appropriate conservation actions within those guidelines would affect federal funding to the state for ESA-related activities, and where multi-state or international issues remain, initiate appropriate federal action.

Conservation actions, especially regulatory decisions, may be most efficiently handled if they are a part of the recovery or conservation planning process that could be assumed by states. Any regulatory action would be through state regulatory processes. This would make it easier to determine and justify why regulations are required and other conservation tools were not adequate to recover or stabilize populations. It would also increase accountability for such decisions.

Ongoing effective conservation efforts should be recognized and rewarded. For example, if one state is effectively conserving a species that is imperiled in the rest of its range, then that state's population should be excluded from the application of federal regulations.

Comparable Prohibitions Under Sections 7 and 9

A number of perceived and real differences exist between how the federal government (Section 7) and private citizens (Section 9) are treated with respect to take and jeopardy prohibitions, the way potential impacts are addressed, and the time frames associated with processing impact assessments. Section 10 of the Act, or its implementation, needs to be changed so that private landowners are treated at least as promptly and fairly as are federal entities that may impact a rare species.

Exempting Minor Violations

Strategies that rely more on incentives and cooperative and voluntary efforts and less on regulations are preferred and more effective. The Act needs to be modified to prohibit penalizing, as determined by the state and federal agencies, minor or *de minimis* violations of the ESA, such as the incidental take of a few individuals of all but the most seriously endangered species in the ordinary course of otherwise lawful activities. This would be similar to California Senate Bill No. 1549 that was introduced in February 1994. Penalties under the Act would then be reserved for more flagrant and serious violations.

Recovery and Conservation Planning

State and local conservation agreements should be promoted as an alternative to federal regulations in all or parts of a species' range. Recovery plans need to become much more practical, acknowledging biological, fiscal and social realities. They need to be directed more at management activities that apply toward actual recovery. In order to produce these plans, recovery teams

should always be formed and should include economists, landowners and representatives from state agencies, as well as biological experts. Recovery plans must present specific recovery criteria that would initiate down-listing. Down-listing should begin within 120 days after the criteria are met. Decisions about whether or not to designate critical habitat should be made in each recovery plan.

Down and Delisting

Recovery and delisting efforts should be given at least as much attention and funding as are given to the listing process. The Act should be modified so that the status of species is reviewed periodically, and if mandated criteria are met, then the process of down-listing should be immediately triggered and proceed rapidly. Down-listing by state or geographic population should be made easier, which would provide an extra incentive for private landowners to help recover species. Federal regulations, if imposed, may be suspended by the Secretary of Interior in all or parts of a species range if state or local conservation agreements protect species and habitat.

Decoupling Principle

Listing should be decoupled from the consequences of that action. Listing decisions should be biologically-based and should use all of the best scientific knowledge available and provide for a peer review process. The development of a recovery plan should incorporate all identifiable and necessary actions to conserve and recover the species. Socio-economic considerations should be reviewed and factored into recovery action. Recovery plans should be developed within a specific time frame within an open process to include state agencies and affected parties. Emergency listing procedures provide the Secretary of Interior a means to protect species between the time of listing and plan development. The recovery plan embodies actions necessary to conserve the species and, upon adoption, invokes the full authority of the Act.

Explanatory Notes

1. Concerns about interim takings (between listing and recovery plan) could be handled by emergency listing provisions if needed.

2. Critical habitat — part of recovery plan.

3. Section 7 consultations required on listing, if necessary. The consultation process being modified to include states.

4. Time between listing and recovery plan allows for the grouping of species into ecosystem plans, provides time and notice to affected parties to participate.

5. The concept of a recovery plan would be greatly modified to include all actions necessary to conserve species, including socio-economic impact analysis, full record of input, etc. The recovery plan should be reoriented to management action rather than its present research orientation. State agencies and affected parties should be included on recovery teams.

6. Issuing a recovery plan would become a record of decision. The Secretary could also determine that a recovery plan not be prepared if circumstances do not warrant it. That decision should be made within a fixed time period, as should the preparation of a recovery plan.

7. An alternative would be to establish a three-step process: Listing - Assessment - Recovery Plan. The assessment would include points 4, 5, 6.

REAUTHORIZATION OF THE FEDERAL ENDANGERED SPECIES ACT:

Summary of the Position Paper

Common Sense Approach

1. Focuses on the goal of protecting endangered species, rather than the control of land use and urban growth.
2. Champions the rights and conservation importance of rural landowners.
3. Emphasizes accountability, incentives and more local control.
4. Gives at least as much attention and funding to recovery and delisting activities as to listing.

Conservation Benefits

1. Emphasizes greater voluntary involvement by landowners to achieve conservation goals.

State Primacy

1. Recognizes preeminent state authority and provides for a greater state role in the Act.
2. Allows states to develop unique conservation strategies that work for them.

Private Landowner Rights

1. Guarantees landowner consent before data can be gathered from his/her property.
2. Guarantees landowner ability to access and challenge data.
3. Guarantees landowners an active voice in determining the nature of conservation actions that affect them.
4. Requires changes so that landowners are treated at least as promptly and fairly as are governmental entities.

Incentives and Cooperation Rather Than Regulations

1. Promotes use of inheritance and income tax breaks as conservation incentives.
2. Supports use of existing farm programs to fund and support landowner conservation efforts.
3. Empowers landowners and local communities with accurate accessible conservation information and a full range of conservation options and technical assistance.
4. Requires justification for using regulations rather than voluntary conservation actions.
5. Regulations, if used, would be through state regulatory processes.
6. Supports regulations that would be specific to conservation needs, rather than broad based.
7. Exempts minor regulations violations.

Greater Accountability

1. Ensures that by decoupling regulations from listing:
   a) biologists are more accountable for which species are listed, and
   b) decision-makers are more accountable for which conservation actions are used, including regulations.

Application of Better Science

1. Requires refinement and standardization categories of endangerment.
2. Requires developing more rigorous listing standards.
3. Requires the use of the best verifiable science for listing and conservation planning.
4. Requires petitions to be exposed to an independent, objective, scientific peer review.

offerors to be selected for phase-two must not exceed 5 unless the contracting officer determines that specifying a number greater than 5 is in the Government's interest and is consistent with the purpose and objectives of the two-phase selection process. For phase-two the solicitation should identify all factors, including price or cost, and any significant subfactors that will be considered in awarding the lease and state the relative importance the Government places on those evaluation factors and subfactors and otherwise comply with paragraph (a)(7)(i) of this section.

* * * * *

Dated: May 10, 1996.

Ida M. Ustad,

Deputy Associate Administrator for Acquisition Policy.

[FR Doc. 96–12198 Filed 5–15–96; 8:45 am]

BILLING CODE 6820–61–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1330

[STB Ex Parte No. 547]

Removal of Obsolete Regulations Concerning Filing Quotations for Government Shipments

AGENCY: Surface Transportation Board.

ACTION: Final rule.

SUMMARY: The Surface Transportation Board (the Board) is removing from the Code of Federal Regulations obsolete regulations concerning the filing of rate quotations for government shipments.

EFFECTIVE DATE: January 1, 1996.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 927–7513. [TDD for the hearing impaired: (202) 927–5721.]

SUPPLEMENTARY INFORMATION: Effective January 1, 1996, the ICC Termination Act of 1995, Pub. L. No. 104–88, 109 Stat. 803 (ICCTA) abolished the Interstate Commerce Commission (ICC) and established the Board within the Department of Transportation. Section 204(a) of ICCTA provides that "[t]he Board shall promptly rescind all regulations established by the [ICC] that are based on provisions of law repealed and not substantively reenacted by this Act."

Former 49 U.S.C. 10721(b)(1) expressly provided that a common carrier could provide transportation for the United States government without charge or at a reduced rate.[1] That provision is retained in new 49 U.S.C. 10721 (rail transportation), 15712 (transportation by motor or water carriage and freight forwarders), and 15504 (pipeline transportation). However, the ICCTA removed the requirement of former 49 U.S.C. 10721(b)(2) that common carriers generally file copies of rate quotations or tenders with both the ICC and the department, agency or instrumentality of the United States government for which they were made. Therefore, the ICC regulations to implement the quotation filing requirement, which were codified in part 1330 at 43 FR 59844 (December 22, 1978),[2] have been rendered obsolete. Because the statutory basis for the part 1330 regulations has been removed, we are eliminating those rules.

Because this action merely reflects, and is required by, the enactment of the ICCTA and will not have an adverse effect on the interests of any person, this action will be deemed to be effective as of January 1, 1996.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR Part 1330

Freight, Government procurement, Motor carriers, Moving of household goods, Pipelines, Railroads.

Decided: May 2, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams,

Secretary.

PART 1330—[REMOVED]

For the reasons set forth in the preamble and under the authority of 49 U.S.C. 721(e), title 49, chapter X of the Code of Federal Regulations is amended by removing part 1330.

[FR Doc. 96–12280 Filed 5–15–96; 8:45 am]

BILLING CODE 8915–00–P

[1] Former section 10721 recodified section 22 of the Interstate Commerce Act. Section 22 allowed common carriers to depart from their tariffs in providing service to the government.

[2] The regulations were later modified to exempt nonagricultural rail rate quotations from the filing requirements. *Railroad Exempt.—Filing Quotations—Section 10721*, 7 I.C.C.2d 325 (1991).

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Restarting the Listing Program and Final Listing Priority Guidance

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of listing priority guidance.

SUMMARY: On March 11, 1996, the Fish and Wildlife Service (Service) published a notice in the Federal Register describing interim guidance for setting priorities in the listing program and solicited public comments. The Service took this action in anticipation of receiving a limited amount of funds to resume listing activities. Having received a limited appropriation of listing funds for the remainder of fiscal year 1996, the Service announces final listing priorities that will govern the expenditure of the available funds for the remainder of the fiscal year.

DATES: This guidance takes effect May 16, 1996 and will remain in effect until September 30, 1996, unless extended by further notice.

ADDRESSES: Questions about this guidance should be directed to the Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 1849 C Street, N.W., Mailstop ARLSQ–452, Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: E. LaVerne Smith, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, 703–358–2171 (see **ADDRESSES** section).

SUPPLEMENTARY INFORMATION:

Background

Moratorium and Funding Constraints

Over the past thirteen months, the Service's Endangered Species listing program, which operates under the authority of section 4 of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*), has been sharply curtailed by a variety of legislative and funding restrictions. Public Law 104–6, which took effect April 10, 1995, rescinded $1.5 million from the Service's then-current listing appropriation of $7.999 million and also stipulated that the remaining listing funds could not be used to make final listing or critical habitat designations. The net effect of Pub. L. 104–6 has been that no new species have been added to the lists of endangered and threatened

wildlife and plants in more than a year and as a result, a backlog of 243 proposed listings has accrued.

From October 1, 1995, until April 26, 1996, the Department of the Interior operated without a regularly enacted, full-year appropriations bill. Instead, funding for most of the Department's programs, including the endangered species listing program, was governed by the terms of a series of thirteen "continuing resolutions" (CRs). The details of these are complex, and are summarized in what follows. Their net effect was essentially to shut down the listing program.

The CR for the period October 1, 1995, through November 13, 1995, continued the moratorium on final listings and critical habitat designations from the April 10, 1995, enactment. The listing program was funded at a level equal to 95% of the average of the funding for these activities provided in the appropriate appropriations bills then pending before the House and Senate. For listing activities, the House bill provided zero funds. The Senate bill provided only a token amount ($750,000) for the entire fiscal year. Averaging these two, and apportioning 95% of the average across the six weeks the CR was in effect meant that only $43,000 was available during this time period.

The Acting Director of the Service issued guidance on October 13, 1995, describing the activities on which these funds could be spent—(1) completion of any comment periods and public hearings for pending proposals; (2) completion of pending petition findings; and (3) processing of any delistings or reclassifications that were in the Washington Office awaiting approval. In the same memorandum the Director also ordered each Regional Director to begin the orderly transfer of listing personnel into other activities that were likely to be funded during fiscal year 1996. This step was necessary because all indications were that Congress would further restrict the listing budget, which could have resulted in reductions-in-force. The resulting loss of institutional and scientific expertise would have crippled the listing program.

The listing program had to be shut down completely upon expiration of the first continuing resolution. The CR in effect from mid-November through December 15 provided no funds to the listing program and also continued the moratorium provisions of Pub. L. 104–6. Therefore, on November 22, 1995, the Director ordered the reassignment of all listing staff to other duties until funds for these activities were restored. Similar constraints applied during the governmental shutdown and the CRs in effect from December 16, 1995, through January 26, 1996.

The CR that governed the period January 27 through March 15, 1996, provided that funds would be available for the listing program based on the rate established in the House-Senate conference report the Department of the Interior's fiscal year 1996 Appropriations Act (Section 126 of Pub. L. 104–99). This report included an annual rate of $750,000 for listing activities and continued the moratorium. At an annual rate of $750,000, about $100,000 were available for listing activities during the period of this CR.

Short-term CRs covered the periods March 16–22, March 23–29, March 30–April 24, and April 24–26, 1996. These CRs continued the moratorium on final listings and critical habitat designations, and altogether provided the Service with very limited funding ($90,000) during this period.

These very limited funds were quickly expended in paying for Federal Register publication charges for a variety of listing documents that were in the Washington Office awaiting publication (e.g., Vertebrate Population Policy, miscellaneous petition findings, and delistings or reclassifications) and providing biological information to the district courts.

On April 26, 1996, the appropriation for the Department of the Interior for the remainder of fiscal year 1996 was finally enacted into law. It provides approximately $4 million for the Service's listing program over the entire fiscal year. The Service had already expended $233,000 of the appropriation, leaving $3,767,000 for the remainder of fiscal year 1996. This act also extends the moratorium on expenditure of funds for final decisions on listings and critical habitat designations, but it also empowered the President to waive the moratorium provisions. The President issued a waiver of these provisions on April 26, 1996, shortly after signing the Omnibus Budget Reconciliation law.

Significant obstacles remain as the Service restarts its listing program. The available funds fall far short of what is needed to clear away the backlog that has built up. Currently the Service faces a backlog of 243 proposed species, a far larger backlog than has existed in recent times. This poses a particularly difficult problem for the Service in light of the other Section 4 activities that require attention such as resolving the conservation status of 182 candidate species (see 61 FR 7596; February 28, 1996); addressing pending court orders; and resolving petitions for 57 species. This highly irregular situation demands that the Service establish biologically defensible work priorities to guide expenditures of the limited listing appropriations in a manner that best serves the purposes of the Act.

The Service is aware that the Department of Commerce and the National Marine Fisheries Service (NMFS) have also faced a highly irregular funding situation in fiscal year 1996 and may have different priorities with respect to restarting their section 4 listing program. This guidance and its priorities are not intended in any way to affect the interpretation of the Act, the Secretary of Commerce's and NMFS' decisions regarding implementation of the Act, Commerce's and NMFS' budget priorities or Commerce's and NMFS' administration of its section 4 listing program. This guidance is intended only to reflect the implementation difficulties faced by the Department of the Interior and the Service, and not those of other agencies or Departments.

Principles for Restarting the Listing Program

The primary purposes of the Endangered Species Act are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section."

16 U.S.C. 1531(b). It is long-standing Service policy that highest priority be given to those species believed to face the greatest threat of extinction. It is especially important to continue this policy with the current financial constraints. In carrying out that policy, four basic principles will govern the Service's implementation of the listing process as the listing program is restarted:

(1) Highest priority will be given to protecting species most in need, based on the priorities established by the listing priority guidance finalized in this notice and the 1983 Listing Priority Guidelines (48 FR 43098–43103; September 21, 1983);

(2) Biological need, not the preferences of litigants, should drive the listing process. The Service will work closely with the Department of Justice to defend its priority system in those cases where plaintiffs, in pending or new cases, request actions that would cause the Service to diverge from the principles discussed here, and therefore,

in the judgment of the Service, would divert resources from providing prompt protection to those species the Service believes to be in greatest need of the protections of the Endangered Species Act;

(3) Sound science, including peer review, will form the foundation of each and every listing action; and

(4) Public comment and participation in the petition and rulemaking processes will be enhanced to ensure that the States, other Federal agencies, and the affected public are provided with complete explanations of the action and are provided every opportunity to provide comments or information. All comments received will be carefully evaluated and responded to.

Actions Required To Restart the Listing Program

The resumption of an effective listing program will require a variety of actions. First, the budget interruptions described above required the Service to reassign all personnel funded through the listing program to other activities from mid-November 1995 through April 26, 1996. Many of the listing biologists are in the process of being returned to their regular duties. The tasks that these biologists have been working on during the listing shutdown will require a period of orderly shutdown or transfer. The Service estimates that it may require as much as 45 days to fully reengage all listing personnel. Where vacancies exist, steps are being taken to fill them.

As staff come back to the program, all listing packages will be reviewed as quickly as possible to determine their priority placement according to the listing priority guidance reconfirmed here.

Upon completion of this initial stage, the next step will be determined by the facts involved in each package. The packages are in various states of completeness, both as to substance and to process. Some merely require a final review to ensure that they accurately reflect the current situation, while others will require extensive revision because the biological situation may have changed since the proposal was issued. Still other proposals were issued shortly before the funding interruption, so that requests for public hearings or to extend the comment periods could not be acted upon. As a result of this variety, final determinations on the pending proposed listings will move through the system at very different rates. Those that still require addressing public comments will take considerably more time to bring to the stage of final decision.

The $4 million currently appropriated is substantially less than what is needed to eliminate the current backlog of 243 proposed species. Because the facts involved in each final listing determination can vary widely, it is impossible to generate meaningful "average" costs for each listing activity. Processing a proposed final listing may take only a few thousand dollars if basically all steps except final approval and Federal Register publication are completed. But processing may take many thousands of dollars if additional comment and responses or public hearings are required. The economic analyses required for critical habitat designations, for example, may require substantial dollars as well as time.

Following completion of work by the Field Office, draft recommendations on each package will be sent to the Regional Office for policy review and, if appropriate, concurrence. Depending on the remaining steps that must be completed, the above described steps may take from 30–120 days.

Following approval by the Regional Office, the draft recommendations will be sent to the Washington Office for technical and policy review and approval by the Director. Including a brief review by the Department's Office of Regulatory Affairs, review time in the Washington Office may require 30 to 60 days, especially if changes are necessary. Rules with critical habitat also require review by the Office of Management and Budget and will take additional time to complete.

Pending Litigation

The Service is presently involved in numerous cases in federal court that involve proposed and final listings, petition findings, and critical habitat designations. As of April 1, 1996, approximately 60 separate civil suits directed at the process of listing species under the Act were pending against Federal officials or agencies. As of April 1, 1996, the Secretary of the Interior had received approximately 300 Notices of Intent to Sue (required under the Act before suit may be filed (see 16 U.S.C. § 1540(g))), on which litigation has not yet been, but could be filed at any time. Many of these Notices of Intent deal with the listing process.

During the moratorium on final listings and critical habitat designation that was in effect for nearly thirteen months, the courts generally agreed with the Service that it could not legally act to meet deadlines without a lawful source of funds. *See, e.g., Environmentol Defense Center v. Babbitt*, 73 F.3d 867 (9th Cir. 1995). Now that the moratorium is no longer in effect, and funds, albeit limited, are available for this task, the Service must decide how to best spend these funds to carry out the purposes of the Act. The press of pending and threatened new litigation could complicate this task immensely.

This pending and threatened litigation presents many competing and conflicting claims, and in the current budgetary situation translates into expensive demands on inadequate resources. Actions requested by plaintiffs cover the entire spectrum of listing activities, from petitions to add species to the list to requests to overturn existing listings. Taken collectively, these pending and potential cases seek different and sometimes diametrically opposed results.

Defending existing and any new lawsuits can divert considerable resources away from the Service's efforts to conserve endangered species. When the Service undertakes one listing activity, it inevitably forgoes another. In some cases courts have ordered the Service to complete activities that are simply not, in the Service's expert judgment, among the highest biological priorities.

Development and Publication of Interim Listing Priority Guidance and Its Relationship to the 1983 Priority Guidance

In 1983 the Service adopted guidelines to govern the assignment of priorities to species under consideration for listing as endangered or threatened under section 4 of the Endangered Species Act (48 FR 43098–43105; September 21, 1983) The purpose of those guidelines was to establish a rational system for allocating available appropriations to the highest priority species when adding species to the lists of endangered or threatened wildlife and plants or reclassifying threatened species to endangered status. The system places greatest importance on the immediacy and magnitude of threats, but also factors in the level of taxonomic distinctiveness by assigning priority in descending order to monotypic genera, full species, and subspecies (or equivalently, distinct population segments of vertebrates).

The 1983 guidelines do not establish priorities among different types of listing activities, which include processing pending proposed listings, new proposed listings, delistings or reclassifications, petition findings, and critical habitat determinations. The backlog of proposed species created by the moratorium and the recent funding

constraints prompted the Service to establish priorities among the various listing activities.

Accordingly, earlier this spring, in anticipation of facing a possible lifting of the moratorium on final listings and critical habitat designations but with only limited funds available to clear away the large backlog of proposed species that had built up in the interim, the Service published interim listing priority guidance in the March 11, 1996 edition of the Federal Register (61 FR 9651–9653) and solicited public comment on that guidance. Summaries of the interim guidance and all comments received, and responses to the comments, are included in the following sections.

The 1983 guidelines properly set priorities for the Service, under a fully-funded Section 4 program, for making expeditious progress in adding species to the Lists of Endangered and Threatened Wildlife and Plants. They are not, however, sufficient to deal with the present backlog of proposed species. The Service developed the Interim Listing Priority Guidance, which in a slightly modified form is now republished as final guidance, to provide a means to reconcile these competing and conflicting demands in a biologically effective and efficient way to best carry out the purposes of the Act. Specifically, after careful deliberation, the Service has decided that, in order to focus conservation benefits on those species in greatest need, processing final determinations relative to the pending proposed listings should receive higher priority than other actions required by section 4 (such as petition findings, new proposed listings, reclassifications or delistings, and critical habitat determinations). Publication of the priority guidance is intended to explain to the public (including litigants and reviewing courts) precisely how the Service believes it should use its limited listing appropriations to maximum effect to carry out the purposes of the Act.

The Department of Justice and the Department of the Interior Solicitor's Office will generally ask litigants and the courts to defer to this listing priority system. Near the end of fiscal year 1996, the Service will review the extent of the remaining listing backlog and the fiscal year 1997 budget situation to determine if an extension of this guidance is necessary. For the reasons set out in the preamble of the notice, the Service finds that good cause exists under 5 U.S.C. 553(d) to make this guidance effective upon the date of publication in the Federal Register.

Summary of Interim Listing Priority Guidance

The main principle underlying the listing priority guidance is to focus the limited listing resources on those actions that will result in the greatest conservation benefit for the species in most urgent need of the Act's protections. Because only listed species receive the full conservation benefits and substantive protections of the Act, and because the vast majority of the proposed species face high-magnitude threats to their continued survival, the Service decided to give highest priority to handling emergency situations and resolving the listing status of the 243 outstanding proposed listings. Highest priority actions were assigned to Tier 1, lowest priority to Tier 5.

Tier 1—Emergency listings. Under section 4(b)(7) of the Act, the Secretary may list a species on an emergency basis (without the usual public notice and comment procedure) if an emergency exists that poses "a significant risk to the well-being of any species of fish or wildlife or plants. * * *" Generally, an emergency listing rule remains in effect for 240 days, during which time the Service typically issues a proposed listing and makes a final determination as to whether final listing is appropriate.

Tier 2—Preparation and processing of final decisions on outstanding proposed listings. Within Tier 2, highest priority will be given to species facing the highest magnitude and most imminent threats. For species with equal listing priority assignments, the following types of actions will receive subsequent priority—listing packages that cover multiple species; listing packages that can be quickly cleared (e.g., those with few public comments or factual questions presented); and proposals that have been pending the longest.

Tier 3—Preparing and processing new proposed listings for species facing high-magnitude threats; and screening petitions for emergency situations.

Tier 4—Preparing and processing proposed listings for species facing moderate- or low-magnitude threats; processing final decisions on pending proposed reclassifications and delistings; preparing and processing administrative findings for petitions.

Tier 5—Preparing and processing critical habitat determinations and preparing or processing new proposed delistings or reclassifications.

Summary of, and Responses to, Comments and Recommendations on the Interim Listing Priority Guidance

Comments on the interim listing priority guidance were received from the following organizations—BMI Marketing and Marine Services Corp.; Arizona Game & Fish Department; the Marine Industries Association of Florida, Inc.; and Messrs. Eric Glitzenstein, Michael Sherwood, and William Snape, counsel for the plaintiffs in the *Fund for Animals v. Lujon*, Civ. No. 92–800, D.D.C.

The comments from the Arizona Department of Game & Fish expressed general support for the interim priority guidance, but recommended that reclassifications and delistings should receive higher priority, perhaps in Tier 2 of the interim guidance. The Service recognizes the useful regulatory relief that delistings or reclassifications can provide. The priority guidance provides that to the extent such actions have been processed and approved through the Regional offices, these actions will proceed while the subject guidance is in effect. However, generation of new proposed delistings or reclassifications cannot be justified in a time of extreme budget constraints and while there is an extensive backlog of proposed species awaiting final determinations. The Service regrets that the limited appropriations made available, coupled with the backlog of new listings built up by the moratorium, have delayed delistings and reclassifications. The Service has decided to combine all activities that were assigned to Tiers 3, 4, and 5 and place them collectively in a single Tier 3 for reasons explained below.

The Marine Industries Association of Florida, Inc. (MIA) expressed a similar concern about the lower priority of delisting or reclassification actions, responded to above. The MIA also commented that the proposed guidance should not be used to "rush new listings thru" for species that are highly scientifically controversial. In the interim listing priority guidance, the Service noted that additional public comment periods might be necessary before rules can be finalized if there are unresolved questions or new information that must be evaluated. (See 61 Fed. Reg. at 9653, section entitled "Setting Priorities Within Tier 2"). The Service will ensure that sound science, including peer review, forms the foundation for all listing decisions.

Comments submitted by BMI Marketing & Marine Services Corp., cautioned that final decisions on proposed listings should not be rushed, advising the Service to take the same care and procedure as if no time had been lost. The Service agrees with this comment. Each pending proposal will be reviewed to ensure it contains current and accurate information.

Where necessary, public comment periods will be reopened.

The attorneys representing the Fund For Animals (FFA) expressed concern that they were not consulted prior to release of the interim guidance, since it will substantially affect the Service's implementation of a court-ordered settlement agreement with FFA dealing with the processing of species regarded as candidates for listing under the Act. The FFA attorneys also expressed concern that the Service violated section 4(h) of the Act by failing to provide opportunity for public comment prior to enactment of the priority guidance. The FFA attorneys asserted that requiring completion of all final listings before beginning new proposals is contrary to the settlement agreement and inconsistent with sound administration of the Act. The FFA also expressed concern that the Service has erected a series of administrative hurdles that unnecessarily slow the speed at which species can be added to the list.

On the objection to making the interim guidance effective immediately, the Service believes it acted reasonably and responsibly in so doing. More importantly, although the Service found, as stated in the interim guidance (see 61 FR 9651), that good cause existed to make the guidance effective immediately, it nonetheless solicited and received comments from the public, and has taken them into account and responded to them now in confirming the guidance. There was no opportunity to implement the interim guidance anyway, because the listing program was essentially unfunded and the moratorium was not lifted until President Clinton approved a waiver of the moratorium on April 26, 1996.

As discussed above, the limited appropriated funds for listing activities now available are simply not sufficient to allow the Service to meet all of its immediate responsibilities under Section 4 of the Act. Thus the Service must make difficult decisions about how best to allocate the limited funds. In anticipation of this situation, the Service made the interim listing priority guidance effective immediately upon publication on March 11, 1996 since it had no idea when a full year appropriation might be enacted (Congress having enacted several short-term Crs during this period) and the Service wanted to have a plan for dealing with the situation it knew it would face when the moratorium was lifted. Comments received in response to the interim guidance were considered and are addressed in this notice.

Unless extended, the guidance is effective until the end of this fiscal year on September 30, 1996. Given the magnitude of the backlog and the limited funds available, however, it is highly unlikely that the Service will complete processing of all of the pending proposed listings within that time. Most of the outstanding proposed listings are for species determined to face high-magnitude threats (priority 1–6 under the 1983 listing priority guidelines). Once the backlog of proposed species that face high-magnitude threats has been brought under control, the Service will rescind this guidance and return to a more typical implementation of section 4 that also includes preparation of proposed listings, delistings, and processing of petitions.

The court-approved Settlement Agreement in *Fund for Animals v. Lujon*, Civ. No. 92–800 (GAG) (D.D.C., Dec. 15, 1992) discussed by Glitzenstein *et al.* in their comments illustrates the problem posed by competing resource demands. That agreement requires the Service to resolve the conservation status of 443 candidate species (either by the publication of a proposed listing rule or the publication of a notice stating reasons why listing is not warranted) by September 30, 1996. Resolution of their status would require, for each species, publication of either a proposed listing rule or a notice stating reasons why listing is not warranted. The agreement does not, of its own terms, require final decisions on listings. Therefore, while it in a sense advances the process of formally protecting species, full compliance with the agreement will not bring the full protections of the Act to any species.

Up to the time the funding for the listing program became severely constrained, the Service was on track to achieve full compliance with this agreement. The Service has published, during the period covered by the agreement, proposed listing rules for 359 candidate species.

Despite this progress, the Service is now left with the following dilemma. If it were to continue to expend money on moving candidate species forward to the proposed listing state in order to comply with the settlement agreement, it would deplete the entire $4 million listing appropriation for fiscal year 1996. Processing of proposed listing rules requires the investment of considerable time and resources. It involves substantial research, status review, coordination with State and local governments and other interested parties, and conducting public hearings and peer review.

If the Service were to devote its entire budget for the remainder of fiscal year 1996 to complying with the *Fund for Animals* Settlement Agreement, the available funds would be insufficient. More important, if the Service were to follow this course, it would be devoting no resources to final listing decisions on the 243 species that have already been proposed for listing. Being so close to receiving the full protection of the Act, these species would remain unprotected under this course of action, while all the Service's efforts in the listing process would be bent toward deciding whether to move candidate species closer to proposed listing, where they receive some limited procedural protection (the section 7 conference requirement, see 16 U.S.C. 1536(a)(4)), but not the full substantive and procedural protections offered by final listing. This course of action would also result in a still larger backlog of proposed species awaiting final action.

Put a little differently, this one court-approved settlement agreement, absent modification, would defeat a primary purpose of lifting the listing moratorium. The Service is recommending, therefore, that the Department of Justice seek appropriate relief from the courts to allow the highest priority proposed species to be processed and, if appropriate, added to the lists of endangered and threatened wildlife and plants, consistent with the provisions of this listing priority guidance.

The FFA also expressed concern that the Service has erected a series of administrative hurdles that unnecessarily slow the speed at which species can be added to the list. This comment does not pertain to the subject matter of this notice, which deals with the relative priority of various listing activities undertaken by the Service, rather than the procedures used to accomplish those activities. Nevertheless, the Service reaffirms it will process decisions on proposed species as expeditiously as possible, consistent with the substantive and procedural requirements of Section 4 of the Act.

The administrative "hurdles" noted by the FFA consist of joint policy statements issued by the National Marine Fisheries Service and the Fish and Wildlife Service on July 1, 1994 (59 FR 34270–34275). Those joint policies are aimed at ensuring that the Act's requirement to use the "best available scientific and commercial data" in the decision-making process on petitions and proposed listing rules, *see* 16 U.S.C. 1533(b), is met and that appropriate coordination occurs with State conservation agencies and the public.

Final Listing Priority Guidance

The Service has considered all comments and believes that some revision of the interim guidance is appropriate. The Service has decided to assign all activities other than emergency listings and final review of pending proposals to Tier 3. This decision is based on the reality that the fiscal year 1996 appropriation is insufficient to fully dispense with the entire backlog of proposed species, such that the Service is unlikely to undertake any actions below Tier 2 prior to September 30, 1996. The Service adopts the revised listing priority guidance as final guidance for assigning relative priorities to listing actions conducted under section 4 of the Endangered Species Act, to remain in effect until September 30, 1996, unless extended. This guidance supplements, but does not replace, the current listing priority guidelines (48 FR 43098; September 21, 1983), which are silent on the matter of prioritizing among different types of listing activities. The terms of this guidance are effective only on the listing priorities of the Service. Listing actions under the jurisdiction of the Department of Commerce, National Marine Fisheries Service will be processed according to priorities established by that agency.

Section 4(b)(1) of the Act requires the Service to use the "best available scientific and commercial information" to determine those species in need of the Act's protections. It has been long-standing Service policy that the order in which species should be processed for listing is based primarily on the immediacy and magnitude of the threats they face. Given the large backlog of proposed species, the backlog of pending petitions, and the list of candidate species awaiting proposal, it will be extremely important for the Service to focus its efforts on actions that will provide the greatest conservation benefits to imperiled species in the most expeditious manner.

The Service will base decisions regarding the order in which species will be proposed or listed on the 1983 listing priority guidelines and the priority guidance in this notice. These decisions will be implemented by the Regional Office designated with lead responsibility for the particular species. The Service allocates its listing appropriation among the Regional Offices based primarily on the number of proposed and candidate species for which the Region has lead responsibility. This ensures that those areas of the country with the largest percentage of known imperiled biota will receive a correspondingly high level of listing resources. The 1983 listing priority guidelines and this guidance will be applied at the National, Regional, and local levels. Given the workload-based allocation, and the fact that the $4 million is not sufficient to complete final determinations on all pending proposed listings, the Service does not anticipate undertaking any actions in Tier 3 prior to September 30, 1996.

To address the biological, budgetary, and administrative issues noted above, the Service therefore adopts the following listing priority guidance.

The following sections describe a multi-tiered approach that assigns relative priorities, on a descending basis, to actions to be carried out under section 4 of the Act. The various types of actions within each tier (such as new proposed listings, administrative petition findings, etc.) will be accorded roughly equal priority, but the 1983 listing priority guidelines will be used as applicable. The Service emphasizes that this guidance is effective until September 30, 1996 (unless extended by future notice) and the agency looks forward to returning to a more typical implementation of the Act's listing responsibilities, to concurrently process petition findings; proposed and final listings, reclassifications, or delistings; and critical habitat determinations, after the backlogs have been reduced.

Tier 1—Emergency Listing Actions

The Service will immediately process emergency listings for species that face an imminent risk of extinction under the emergency listing provisions of section 4(b)(7) of the Act and will prepare a proposed listing immediately upon learning of the need to emergency list. The Service will screen all petitions and other status information it receives to determine if an emergency situation exists.

Tier 2—Processing Final Decisions on Proposed Listings

In issuing the pending proposed listings, the Service found that the vast majority of the proposed species faced high-magnitude threats. The Service believes that focusing efforts on making final decisions relative to these proposed species will provide maximum conservation benefits to those species that are in greatest need of the Act's protections. Since only emergency or final listings provide substantive protection, the Service is of the strong belief that this activity should take precedence over new proposed listings, reclassifications or delistings, petition findings, and critical habitat designations, which in comparison to listing, provide limited conservation benefits.

Setting Priorities Within Tier 2

Most of the pending proposed listings deal with species that face high-magnitude threats, such that additional guidance is needed to clarify the relative priorities within Tier 2. Proposed rules dealing with taxa deemed to face imminent, high-magnitude threats will have the highest priority within Tier 2. The Service will promptly review the backlog of 243 proposed species and each Region will reevaluate the immediacy and magnitude of threats facing all species that have been proposed for listing and revise the species' listing priority assignments accordingly. Those with the highest listing priority will be processed first.

To further prioritize among the Tier 2 actions, proposed listings that cover multiple species will be processed based on the most urgent listing priority of the component species and multi-species packages will have priority over single-species proposed rules with equal priority unless the Service has reason to believe that the single-species proposal should be processed to avoid possible extinction. Furthermore, in those cases where a proposed listing for a high-priority species also includes other species with lower listing priorities, the listing package will not be disassembled to deal only with the high priority species.

Due to unresolved questions or to the length of time since proposal, the Service may determine that additional public comment or hearings are necessary before issuing a final decision for some Tier 2 actions. If the listing priorities are equal, proposed listings that can be quickly completed (based on factors such as few public comments to address or final decisions that were almost complete prior to the moratorium) will have higher priority than proposed rules for species with equivalent listing priorities that still require extensive work to complete.

Given species with equivalent listing priorities and the factors previously discussed being equal, proposed listings with the oldest dates of issue should be processed first.

Tier 3—All Other Listing Actions, Including Processing Reclassifications and Delistings, New Proposed Listings, Petition Findings, and Critical Habitat Designations

While the backlog of candidate species has been reduced substantially since 1992, the Service has determined that 182 species warrant issuance of proposed listings. The Act directs the

Service to make "expeditious progress" in adding new species to the lists and thereby necessitates steady work in reducing the number of outstanding candidate species. Issuance of new proposed listings is the first formal step in the regulatory process for listing a species. However, this step provides only limited conservation benefits and the Service believes that issuance of new proposed listings, even for species facing imminent, high-magnitude threats, should therefore be afforded lower priority so long as a large backlog exists of proposed listings for species facing high-magnitude threats.

The Service will conduct a preliminary review of any petition to list a species or change a threatened species to endangered status to determine if an emergency situation exists or if the species would probably be assigned a high listing priority upon completion of a status review. If the initial screening indicates an emergency situation the action will be elevated to Tier 1. The historical record on listing petitions reveals that fewer than 25 percent of all petitions are found to warrant listing.

Processing reclassifications and delistings can provide welcome regulatory relief. The Service regrets that such activities must be accorded Tier 3 priority due to the limited appropriations provided by Congress and the need to devote scarce funds to carry out the overall protective purposes of the Act.

Designation of critical habitat consumes large amounts of the Service's listing appropriation and generally provides only limited conservation benefits beyond those achieved when a species is listed as endangered or threatened. Because critical habitat protections apply only to Federal actions, situations where designating critical habitat provides additional protection beyond that provided by the jeopardy prohibition of section 7 are rare. It is critical during this period to maximize the conservation benefit of every dollar spent in the listing activity. The relatively small amount of additional protection that is gained by designating critical habitat for species that are already listed is greatly outweighed by providing the protections included in sections 7 and 9 to newly-listed species. Therefore, the Service will place higher priority on addressing species that presently have no protection under the Act rather than devoting limited resources to the expensive process of designating critical habitat for species already protected by the Act.

Rules and Findings Currently Near Completion

The Headquarters Office will promptly process any draft final rules to add species to or remove species from the lists, draft proposed listings or delistings, draft petition findings, draft proposed or final critical habitat determinations, and draft withdrawal notices that were in the Washington Office prior to the date of this notice but could not be processed because of the funding constraints or the moratorium. These actions will require little additional work to complete and the Service believes it to be cost-effective to finish up these actions that were inadvertently delayed by the funding constraints. The anticipated number of such actions is fewer than ten.

Notifying the Courts on Matters in Litigation

The Service will assess the relative priority of all section 4 petition and rule-making activities that are the subject of active litigation using this guidance and the 1983 listing priority guidelines. In many cases, simply identifying the tier in which an activity falls will suffice to determine whether the Service will undertake that action during the time this priority guidance is in effect. The Service, through the Office of the Solicitor, will then notify the Justice Department of its priority determination and request that appropriate relief be requested from each district court to allow those species with the highest biological priority to be addressed first. To the extent that the courts do not defer to the Service's priority guidance and the 1983 listing priority guidelines, the Service will of course comply with court orders despite any conservation disruption that may result.

The Service will not elevate the priority of proposed listings for species simply because they are subjects of active litigation. To do so would let litigants, rather than expert biological judgments, control the setting of listing priorities. The Regional Office with responsibility for processing such packages will need to determine the relative priority of such cases based upon this guidance and the 1983 listing priority guidelines and furnish supporting documentation that can be submitted to the relevant Court to indicate where such species fall in the overall priority scheme.

Authority

The authority for this notice is the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

Dated: May 10, 1996.

Mollie Beattie,

Director, Fish and Wildlife Service.

[FR Doc. 96-12243 Filed 5-15-96; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 658

[I.D. 050896B]

Shrimp Fishery of the Gulf of Mexico; Texas Closure

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Adjustment of the beginning date of the Texas closure.

SUMMARY: NMFS announces an adjustment of the beginning date of the annual closure of the shrimp fishery in the exclusive economic zone (EEZ) off Texas. The closure is normally from May 15 to July 15 each year. This year the closure will begin on June 1, 1996. The Texas closure is intended to prohibit the harvest of brown shrimp during the major period of emigration from Texas estuaries to the Gulf of Mexico so the shrimp may reach a larger, more valuable size and to prevent the waste of brown shrimp that would be discarded in fishing operations because of their small size.

EFFECTIVE DATE: The EEZ off Texas is closed to trawl fishing from 30 minutes after sunset, June 1, 1996, to 30 minutes after sunset, July 15, 1996, unless the latter date is changed through notification in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Michael E. Justen, 813-570-5305.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico shrimp fishery is managed under the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico (FMP). The FMP was prepared by the Gulf of Mexico Fishery Management Council and is implemented by regulations at 50 CFR part 658 under the authority of the Magnuson Fishery Conservation and Management Act. The FMP implementing regulations at 50 CFR 658.26 describe the Texas closure and provide for adjustments to the beginning and ending dates by the Director, Southeast Region, NMFS, under specified criteria.

Biological data collected by the Texas Parks and Wildlife Department indicate

STATEMENT OF JOHN G. ROGERS, ACTING DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, BEFORE THE HOUSE RESOURCES COMMITTEE, REGARDING THE LIFTING OF THE LISTING MORATORIUM

JUNE 25, 1996

Thank you, Mr. Chairman, for providing the Fish and Wildlife Service the opportunity to provide testimony on the procedures which the Service will follow as we restart the endangered species listing program. I emphasize that my testimony reflects only the Fish and Wildlife Service's efforts to restart the endangered species listing program.

During the last three years, the U.S. Fish and Wildlife Service has been striving to implement the Endangered Species Act to conserve species, recognize the rights and concerns of property owners and achieve the greatest conservation benefits in the most cost effective manner. This has been a challenging goal, especially in light of the extreme budgetary constraints and the imposition of a moratorium on final listing decisions and designations of critical habitat. It has been made even more challenging by the highly litigious nature of this issue: the Service is currently faced with several hundred Notices of Intent to Sue, as well as 159 lawsuits filed against the Service on endangered species issues.

The Service has continued its efforts to improve the implementation of the ESA:

- The number of Habitat Conservation Plans approved and under development has dramatically increased. In 1992, 14 HCPs had been approved. By the first of March 1996, 141 had been approved and 300 more are in the works;
- We are seeing incredible enthusiasm from private landowners for new "Safe Harbor" and "No Surprises" agreements; and
- Our emphasis on multispecies conservation efforts is beginning to take hold.

Nevertheless, the double-barrel blast of the listing moratorium and funding cuts essentially moth-balled the listing program for most of the last year. As a result, the Service currently faces a backlog of 242 proposed species awaiting final listing decisions, and another 182 candidate species that await proposals for listing. The Service must also deal with pending court orders to designate critical habitat for 7 species and unresolved petitions for 56 species.

As the Members of the Committee are aware, on April 26th, President Clinton, exercised his authority under the 1996 Omnibus Budget Reconciliation Act and waived the moratorium on final listings and critical habitat designations. The Service fully supported the President's action and is in the process of restarting the listing program. In light of the backlog mentioned above, it became critical that the Service develop and

follow an orderly plan and a priority system for resuming listing activities. This guidance was published in the Federal Register on May 16, 1996 and I would request that a copy of the guidance be placed in the record. I would like to focus the remainder of my testimony on the policy that the Service will follow in restarting the listing program.

As we are all aware, the primary purposes of the ESA are to conserve species and the ecosystems upon which they depend. It is a long-standing Service policy that the highest priority be given to those species believed to face the greatest threat of extinction. In light of continued budgetary constraints it is especially important that the Service continue with this policy. In restarting the listing program, the Fish and Wildlife Service is committed to four guiding principles:

1) **Highest priority** will be given to those species that are in greatest need of the protections of the ESA based on the priorities established in the recently published listing priority guidance and the 1983 Listing Priority Guidelines (which I will outline later in my testimony);
2) **Biological need**, not the preferences of litigants, should drive the listing process. The Service will work closely with the Department of Justice to seek relief from listing cases that divert resources away

from providing protection to the highest priority species;

3) **Sound science**, including peer review, will form the foundation of all listing actions; and

4) **Public comment and participation** in the process will be enhanced to ensure that the States, other Federal agencies, and the affected public are provided with complete explanations of any listing action and are provided every opportunity to comment on or submit information relevant to the decision making process.

Under the listing priority guidance, where such a need exists, the Service will provide immediate "life support" to those species that might otherwise become extinct. This category has been designated as Tier 1 and highest priority will be given to those species believed to face an imminent risk of extinction.

The next highest priority (Tier 2) will be for making final listing determinations on outstanding proposals. Priority will be given to those species that are facing imminent, high magnitude threats. These are species that can be saved if we simply make the effort to attend to them now. The Service will gather additional information before issuing final rules where the records on the existing proposals need to be updated.

Our third priority (Tier 3) will be to conduct other listing

actions, such as review petitions; propose new listings, delistings, or reclassifications; or designate critical habitat for species that are already listed. While Tier 3 actions are certainly important, they simply do not have the same urgency as species that fall within Tiers 1 and 2. For those that truly are in urgent need, we are fully prepared to elevate their priority to Tier 1. Unfortunately, the Service will not be able to undertake the other actions until we can reduce the backlog of existing proposed rules addressing species that have already been determined to merit the protections of the Act. These provisions will only be in effect through September 30, 1996, unless a backlog of priority species and funding constraints makes it necessary to extend the provisions further.

The resumption of an effective listing program has required a variety of actions. First, the Service had to return biologists that were moved out of the listing program due to previous budgetary interruptions. We are still working to complete the restaffing. All listing packages are being reviewed as quickly as possible to determine their priority placement. The proposed listings are in various states of completeness and the rates at which these packages will move through the process will vary. Each proposal will undergo rigorous review to ensure they are based on current and accurate information. Those requiring additional public comments or peer review will require more time. Packages will then be reviewed by both the Regional and

Washington offices prior to being finalized.

The Service must also deal with numerous lawsuits involving petition findings, critical habitat designations and missed statutory deadlines. These lawsuits are diverting considerable resources away from our efforts to conserve species. The listing priority guidance was developed to help the public and the courts know precisely how we should use our limited listing appropriations for maximum effect. The Department of Justice and the Department of the Interior's Solicitor's office have argued in the pending cases that courts should defer to our listing priority system as a rational, biologically based method for dealing with the backlogs created by the moratorium and funding constraints of the past year. We are very hopeful that courts will accept this argument, and we have had some success already. In the Central District of California, for example, the court has stayed a case requiring us to make a decision regarding critical habitat for the western snowy plover until next fiscal year and the plaintiffs in the Klamath River fishes case have agreed to defer to our system.

As I mentioned earlier, the Service is still in the process of restaffing the program, as well as completing the review of listing priorities. The actions we have taken since the moratorium was waived by the President, the listing of the red-legged frog and marbled murrelet critical habitat designation,

were in response to court ordered deadlines imposed prior to the listing moratorium.

In summary, I want the Committee to understand that the management and policy foundation of the ESA are as strong as they have ever been. We have spent the past several years buttressing that foundation with sound scientific guidance, clear priorities founded in conservation biology and clear and open communication with the public. At this point, our ability to deliver further improvements will be determined by the availability of adequate funds and a clear statutory framework.

Testimony of
Rolland A. Schmitten
Assistant Administrator for Fisheries
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
U.S. Department of Commerce

Before the

Committee on Resources
U.S. House of Representatives
June 25, 1996

Introduction

Mr. Chairman and members of the Committee, I am Rolland Schmitten, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce. It is a pleasure to be here today to discuss the implementation and administration of the Endangered Species Act (ESA), and in particular, procedures that will be used to restart the listing process.

As you are aware, since last year, there have been several laws and continuing resolutions that have suspended funding and imposed moratoria on most ESA listing activities by the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), with certain exceptions. NMFS staff that were directly affected by the moratoria were reassigned to other efforts designed to promote state and private conservation initiatives. These efforts include habitat conservation planning, stream

restoration projects, watershed analysis, and development of a regional decision making framework. The delay caused by the moratorium increased the number of NMFS ESA listing actions that are currently outstanding.

NMFS, along with the FWS, is now proceeding with all previously pending listing actions, many of which are subject to statutory deadlines and court actions. Following the President's waiver of the moratorium, I issued guidance to the NMFS Regions on restarting the program as well as the following principles upon which to base listing priorities.

The first principle is the biological risk to the species; the degree of risk may be measured by the immediacy of the threat facing that species (considering the risk of its extinction, based on the numerical status and imminently expected harm to the species, etc.) and the mitigation measures already in place. A listing action that is necessary due to an emergency that poses a significant risk to the well-being of a species is, by definition, of highest priority. Next are final listings that will provide maximum benefit to a species when there are no concerted efforts already in place to protect that species. In such cases, the listing itself will trigger the substantive protection of the ESA. In some cases, if the risk to a species is substantially high, although not sufficiently high to warrant

an emergency listing, it would be appropriate to give higher priority to completing a proposed listings than to completing certain final listings. In some cases, a proposed listing action would provide new incentives for protective actions by Federal and non-Federal entities.

The second principle is the biological benefits from taking the pending action; and in general, listing actions are a higher priority than critical habitat designations unless the critical habitat designation is deemed essential to the conservation of the species. In addition, listings are a higher priority than reclassifications. All threatened species receive substantial protection under the ESA through the section 7 consultation process and section 10 incidental take permits, and virtually all threatened species receive further protection through section 4(d) rules.

In some instances, proposed listings are expected to provide substantial benefit to species even if the requirements of the ESA would not take effect. Such instances exist when a proposed listing would shape and encourage commitments from both Federal and non-Federal entities to protect such species even before their listing. For example, conferencing under section 7(a)(4) and habitat conservation planning under section 10, while not necessarily mandating protection as a statutory requirement,

nevertheless can result in binding commitments from Federal and non-Federal entities that will benefit proposed species. It is NMFS' view that aggressive Federal-state-local conservation initiatives can significantly reduce the risk to species since they will influence activities on non-Federal lands. For example, a large portion of Pacific salmon will benefit from such initiatives because a substantial portion of their distribution occurs outside Federal jurisdiction. Consequently, to provide high-risk species with these protections, it may be necessary to proceed with some proposed listings before some final listings. This decision will be based in part on the third principle, which is the amount of agency resources required to take the pending action. In other words, actions that are nearly complete will have a high priority.

The principles give the highest priority to those species most in need of protection. Support for conservation planning is built into these priorities because NMFS believes that preparation of conservation plans is critical to reducing the risk to most species and potentially reducing the amount of Federal regulation. This strategy allows for optimum use of staff resources and timely completion of mandated ESA responsibilities with other conservation goals.

Pending ESA Determinations

Each NMFS Region is resuming the listing program for the species for which it is responsible based on the above principles. Except as noted, each Region's listing activities will proceed independently of the priorities in the other Regions. The one exception is for salmonid listing activities being coordinated in the NMFS Northwest and Southwest Regions.

The highest priority in the Northwest and Southwest Regions is to complete a final determination for Umpqua River cutthroat trout, located in southern Oregon. This species was proposed as endangered on July 8, 1994 [59 FR 35089] and available information indicates that the species remains at high risk of extinction. Prior to the moratorium, staff had prepared a draft final determination; therefore, little additional Regional effort is required to complete this determination. Presently, no Federal or state recovery efforts specifically take this species into account, although the species does benefit from the Aquatic Conservation Strategy of the President's Forest Plan. A listing would significantly benefit this species. The NMFS estimates a publication date in early September.

Next in priority is to complete a proposed determination for west coast steelhead. On February 16, 1994 [59 FR 27527] NMFS accepted a petition and initiated a status review of west coast

steelhead. On July 17, 1995, NMFS completed an extensive review of all stocks of steelhead residing in the states of Washington, Oregon, Idaho, and California. The Biological Review Team identified fifteen Evolutionarily Significant Units (ESUs) or populations, of which ten were identified to be at some degree of risk. Due to the geographical and biological complexity of steelhead, considerably more scientific, administrative, and policy work needs to be done. NMFS estimates a publication in December 1996 of the determination of the status of these ESUs of west coast steelhead.

The third priority is to complete a final determination for west coast coho salmon. Three ESUs of coho were proposed as threatened on July 25, 1995 [60 FR 38011]. In the upcoming months, new scientific information which has been gathered during the moratoria will be evaluated. During the delay in the final determination, the states of Oregon and California have indicated that they will be moving forwarded on their state initiated conservation efforts for coho salmon. NMFS is working closely with both states on those efforts.

Due to the moratoria, work on the coho listing has been delayed for several months. The Regions need the full year provided in the ESA to consider scientific and conservation information and to make a final listing decision. Accordingly,

NMFS considers that the one-calendar-year deadline (July 25, 1996) is extended by three months to one working year, i.e., October 25, 1996. The Regions will use the available time to solicit and analyze new information. I would like to note that the ESA provides for six-month extension for this process to resolve substantial disagreement over the data on which the listing decision is based. As the October 25 deadline approaches, there is a possibility that NMFS may need to recommend this extension of time.

Conclusion

NMFS has devised a logical strategy to carry out its ESA listing responsibilities. This vigorous schedule is partially driven by court directives to complete certain population assessments and listing determinations. By using these principles, NMFS believes that it can best protect imperiled marine and anadromous species with available NMFS resources.

In addition, our stewardship efforts will continue to concentrate on non-Federal conservation initiatives and regional consensus-building. It is NMFS' view that, in the long-term, aggressive Federal-state-local conservation initiatives have the potential to significantly reduce the risk to species since they

will influence activities on non-Federal lands. Further, NMFS is making an effort to coordinate its science based management actions with other Federal, state, tribal and local stakeholders.

Mr. Chairman, this concludes my testimony. I would be happy to answer any questions the Committee may have.

List of Proposed Species in Chronological Order
as of April 30, 1996

DATE PROPOSED	STATUS	COMMON NAME (SCIENTIFIC NAME) - HISTORIC RANGE
05/11/91	PE	Addax (Addax nasomaculatus) - North Africa
05/11/91	PE	Gazelle, dama (Gazella dama) - North Africa
05/11/91	PE	Oryx, scimitar-horned (Oryx dammah) - North Africa
05/08/92	PE	Bighorn sheep, Peninsular Ranges population (Ovis canadensis cremnobates) - CA, Mexico
05/08/92	PE	Lane Mountain (=Coolgardie) milk-vetch (Astragalus jaegerianus) - CA
05/08/92	PE	Coachella Valley milk-vetch (Astragalus lentiginosus var coachellae) - CA
05/08/92	PT	Shining (=shiny) milk-vetch (Astragalus lentiginosus var micans) - CA
05/08/92	PE	Fish Slough milk-vetch (Astragalus lentiginosus var piscinensis) - CA
05/08/92	PT	Sodaville milk-vetch (Astragalus lentiginosus var sesquimetralis) - CA,NV
05/08/92	PE	Peirson's milk-vetch (Astragalus magdalenae var peirsonii) - CA.
05/08/92	PE	Triple-ribbed milk-vetch (Astragalus tricarinatus) - CA
11/30/92	PE	Braunton's milk-vetch (Astragalus brauntonii) - CA.
11/30/92	PT	Conejo dudleya (Dudleya abramsii ssp parva) - CA
11/30/92	PT	Marcescent dudleya (Dudleya cymosa ssp marcescens) - CA
11/30/92	PT	Santa Monica Mountains dudleya (Dudleya cymosa ssp ovatifolia) - CA
11/30/92	PT	Verity's dudleya (Dudleya verityi) - CA.
11/30/92	PE	Lyon's pentachaeta (Pentachaeta lyonii) - CA.
11/30/92	PE	Hartweg's golden sunburst, (Pseudobahia bahiifolia) - CA
11/30/92	PE	San Joaquin adobe sunburst (Pseudobahia peirsonii) - CA.
12/17/92	PE	Wahane (=Hawane or lo'ulu) (Pritchardia aylmer-robinsonii) - HI
03/23/93	PE	Amaranthus brownii (Plant, no common name) - HI.
03/24/93	PE	Lo'ulu (Pritchardia remota) - HI.
24/93	PE	Schiedea verticillata (Plant, no common name) - HI
05/05/93	PT	Fleshy owl's-clover (Castilleja campestris ssp succulenta) - CA
08/05/93	PT	Hoover's spurge (Chamaesyce hooveri) - CA.
08/05/93	PT	Colusa grass (Neostapfia colusana) - CA.
08/05/93	PE	San Joaquin orcutt grass (Orcuttia inequalis) - CA
08/05/93	PE	Hairy (=pilose) orcutt grass (Orcuttia pilosa) - CA
08/05/93	PT	Slender orcutt grass (Orcuttia tenuis) - CA.
08/05/93	PE	Sacramento orcutt grass (Orcuttia viscida) - CA.
08/05/93	PE	Greene's orcutt grass (Tuctoria greenei) - CA.
08/05/93	PE	Dugong (in Palau) - PW (Palau), East Africa to southern Japan
08/18/93	PT	Snake, northern copperbelly water (Nerodia erythrogaster neglecta) - IL,IN,KY,MI,OH.
08/18/93	PT	Snake, Lake Erie water (Nerodia sipedon insularum) - OH, Canada.
09/24/93	PT	Coccoloba rugosa (Plant, no common name) - PR.
10/01/93	PE	Del Mar manzanita (Arctostaphylos glandulosa ssp crassifolia) - CA.
10/01/93	PE	Encinitis baccharis (=Coyote bush), (Baccharis vanessae) - CA.
10/01/93	PE	Orcutt's spineflower (Chorizanthe orcuttiana) - CA.
10/01/93	PT	Del Mar sand aster (Corethrogyne filaginifolia var linifolia) - CA
10/01/93	PE	Short-leaved dudleya (Dudleya blochmaniae ssp. brevifolia) - CA.
10/01/93	PT	Big-leaved crownbeard (Verbesina dissita) - CA, Mexico.
10/06/93	PE	Winkler cactus (Pediocactus winkleri) - UT
11/29/93	PT	Lizard, flat-tailed horned (Phrynosoma mcallii) - AZ,CA, Mexico
01/06/94	PT	Splittail, Sacramento (Pogonichthys macrolepidotus) - CA.
02/02/94	PE	Frog , California red-legged (Rana aurora draytoni) - CA, Mexico.
02/04/94	PE	Whipsnake, (=striped racer) Alameda (Masticophis lateralis euryxanthus) - CA
/04/94	PE	Butterfly, Callippe silverspot (Speyeria callippe callippe) - CA
02/04/94	PE	Butterfly, Behren's silverspot (Speyeria zerene behrensii) - CA.
02/17/94	PE	Salamander, Barton Springs (Eurycea sosorum) - TX
03/23/94	PE	Talussnail, San Xavier (Sonorella eremita (Pilsbry & Ferris, 1915)) - AZ
03/28/94	PE	Parish's alkali grass (Puccinellia parishii) - AZ,CA,NM
04/20/94	PE	Stebbins' morning-glory (Calystegia stebbinsii) - CA
04/20/94	PE	Pine Hill [illegible] ([illegible]) - CA

List of Proposed Species in Chronological Order
as of April 30, 1996

DATE PROPOSED	STATUS	COMMON NAME (SCIENTIFIC NAME) - HISTORIC RANGE
04/20/94	PE	Pine Hill flannelbush (Fremontodendron decumbens) - CA.
04/20/94	PE	El Dorado bedstraw (Galium californicum ssp. sierrae) - CA.
04/20/94	PT	Layne's butterweed (Senecio layneae) - CA.
05/10/94	PE	Grasshopper, Zayante band-winged (Trimerotropis infantilis) - CA
05/10/94	PE	Beetle, Santa Cruz rain (Pleocoma conjugens conjugens) - CA
05/10/94	PE	Beetle, Mount Hermon June (Polyphylla barbata) - CA
05/10/94	PT	Golden paintbrush (Castilleja levisecta) - OR,WA, Canada (B C).
06/27/94	PE	Delissea undulata (Plant, no common name) - HI.
07/13/94	PE	Jaguar, U.S. population (Panthera onca) - AZ,CA,LA,NM,TX
07/14/94	PT	Eider, Steller's (AK breeding pop.) (Polysticta stelleri) - AK, Russia
07/14/94	PE	Elktoe, Cumberland (Alasmidonta atropurpurea (Rafinesque, 1831)) - KY,TN
07/14/94	PE	Combshell, Cumberlandian (Epioblasma brevidens (I. Lea, 1831)) - AL,KY,TN,VA
07/14/94	PE	Mussel, oyster (Epioblasma capsaeformis (I Lea, 1834)) - AL,KY,TN,VA
07/14/94	PE	Rabbitsfoot, rough (Quadrula cylindrica strigillata (B H Wright, 1898)) - KY,TN,VA
07/14/94	PE	Bean, Purple (Villosa perpurpurea (I Lea,1861)) - TN,VA.
08/03/94	PE	Shiner, Arkansas River (native pop. only) (Notropis girardi) - AR,KS,NM,OK,TX
08/03/94	PE	Mussel, fat three-ridge (Amblema neislerii (I Lea, 1858)) - FL,GA
08/03/94	PT	Slabshell, Chipola (Elliptio chipolaensis) - AL,FL
08/03/94	PT	Bankclimber, purple (Elliptoideus sloatianus (I. Lea, 1840)) - AL,GA,FL
08/03/94	PE	Pocketbook, shiny-rayed (Lampsilis subangulata (I Lea, 1840)) - AL,FL,GA
08/03/94	PE	Gulf moccasinshell (Medionidus penicillatus) - AL,FL,GA
08/03/94	PE	Ochlockonee moccasinshell (Medionidus simpsonianus) - FL,GA
08/03/94	PE	Pigtoe, oval (Pleurobema pyriforme (I.Lea, 1857)) - AL,FL,GA.
08/04/94	PE	Butterfly, Quino checkerspot (Euphydryas editha quino (=E. e wrighti)) - CA, Mexico
08/04/94	PE	Skipper, Laguna Mountains (Pyrgus ruralis lagunae) - CA.
08/04/94	PE	Fairy shrimp, San Diego (Branchinecta sandiegoensis) - CA.
08/04/94	PE	Cuyamaca Lake downingia (Downingia concolor var brevior) - CA.
08/04/94	PT	Parish's meadowfoam (Limnanthes gracilis ssp parishii) - CA.
08/23/94	PE	Spring Creek bladderpod (Lesquerella perforata) - TN.
09/09/94	PT	Eggert's sunflower (Helianthus eggertii) - AL,KY,TN
10/04/94	PT	Rawhide Hill onion (Allium tuolumnense) - CA.
10/04/94	PT	San Bruno Mountain manzanita (Arctostaphylos imbricata) - CA
10/04/94	PE	Chinese Camp brodiaea (Brodiaea pallida) - CA.
10/04/94	PT	Carpenteria (Carpenteria californica) - CA.
10/04/94	PE	Mariposa pussy-paws (Calyptridium pulchellum) - CA.
10/04/94	PT	Springville clarkia (Clarkia springvillensis) - CA.
10/04/94	PT	Greenhorn adobe-lily (Fritillaria striata) - CA.
10/04/94	PE	San Francisco lessingia (Lessingia germanorum var germanorum) - CA
10/04/94	PE	Mariposa lupine (Lupinus citrinus var deflexus) - CA.
10/04/94	PE	Kelso Creek monkey-flower (Mimulus shevockii) - CA.
10/04/94	PT	Piute Mountains navarretia (Navarretia setiloba) - CA.
10/04/94	PT	Red Hills vervain (Verbena californica) - CA
12/12/94	PE	Pygmy-owl, cactus ferruginous (AZ population) (Glaucidium brasilianum cactorum) - AZ,TX, Mexico
12/12/94	PT	Pygmy-owl, cactus ferruginous (TX population) (Glaucidium brasilianum cactorum) - AZ,TX, Mexico
12/15/94	PE	Munz's onion (Allium munzii) - CA.
12/15/94	PE	San Jacinto Valley crownscale (=saltbush) (Atriplex coronata var. notatior) - CA.
12/15/94	PT	Thread-leaved brodiaea (Brodiaea filifolia) - CA.
12/15/94	PT	Navarretia, prostrate (=no-named) (Navarretia fossalis) - CA, Mexico (Baja California).
12/19/94	PT	Contra Costa goldfields (Lasthenia conjugens) - CA.
12/19/94	PE	Navarretia, few-flowered (Navarretia leucocephala ssp. pauciflora) - CA.
12/19/94	PE	Navarretia, many-flowered (Navarretia leucocephala ssp. plieantha) - CA.
12/19/94	PE	Lake County stonecrop (Parvisedum leiocarpum) CA
01/26/95	PE	Tuatara, Brother's Island (Sphenodon guntheri) New Zealand--Brother's Island

List of Proposed Species in Chronological Order
as of April 30, 1996

DATE PROPOSED	STATUS	COMMON NAME (SCIENTIFIC NAME) - HISTORIC RANGE
04/03/95	PE	Salamander, Sonoran tiger (Ambystoma tigrinum stebbinsi) - AZ, Mexico
04/03/95	PE	Huachuca water umbel (Lilaeopsis schaffneriana ssp. recurva) - AZ, Mexico
04/03/95	PE	Canelo Hills ladies'-tresses (Spiranthes delitescens) - AZ
06/05/95	PE	Comal Springs riffle beetle (Heterelmis comalensis) - TX
06/05/95	PE	Comal Springs dryopid beetle (Stygoparnus comalensis) - TX
06/05/95	PE	Peck's cave amphipod (Stygobromus (=Stygonectes) peckl) - TX
06/12/95	PE	Suisun thistle (Cirsium hydrophilum var. hydrophilum) - CA
06/12/95	PE	Soft bird's-beak (Cordylanthus mollis ssp. mollis) - CA
07/25/95	PE	Hoffmann's Rock-cress (Arabis hoffmannii) - CA
07/25/95	PE	Santa Rosa Island manzanita (Arctostaphylos confertiflora) - CA
07/25/95	PE	Island barberry (Berberis pinnata ssp. insularis) - CA
07/25/95	PE	Soft-leaved paintbrush (Castilleja mollis) - CA
07/25/95	PE	Catalina Island mountain-mahogany (Cercocarpus traskiae) - CA
07/25/95	PE	Santa Rosa Island dudleya (Dudleya blochmaniae ssp. insularis) - CA
07/25/95	PE	Santa Cruz Island dudleya (Dudleya nesiotica) - CA
07/25/95	PE	Island bedstraw (Galium buxifolium) - CA
07/25/95	PE	Hoffmann's gilia (Gilia tenuiflora ssp. hoffmannii) - CA
07/25/95	PE	Island rush-rose (Helianthemum greenei) - CA
07/25/95	PE	Island alumroot (Heuchera maxima) - CA
07/25/95	PE	San Clemente Island woodland-star (Lithophragma maximum) - CA
07/25/95	PE	Santa Cruz Island bush-mallow (Malacothamnus fasciculatus var. nesioticus) - CA
07/25/95	PE	Santa Cruz Island malocothrix (Malacothrix indecora) - CA
07/25/95	PE	Island malacothrix (Malacothrix squalida) - CA
07/25/95	PE	Island phacelia (Phacelia insularis var. insularis) - CA
07/25/95	PE	Santa Cruz Island rockcress (Sibara filifolia) - CA
07/25/95	PE	Santa Cruz Island lacepod (=fringepod) (Thysanocarpus conchuliferus) - CA
07/25/95	PE	Munchkin dudleya (Dudleya sp. nov. /ined. "East Point") - CA
08/02/95	PE	Black legless lizard (Anniella pulchra nigra) - CA
08/02/95	PE	Sonoma alopecurus (Alopecurus aequalis var. sonomensis) - CA
08/02/95	PT	Johnston's rock-cress (Arabis johnstonii) - CA
08/02/95	PT	Pallid manzanita (Arctostaphylos pallida) - CA
08/02/95	PT	Bear Valley sandwort (Arenaria ursina) - CA.
08/02/95	PE	Clara Hunt's milk-vetch (Astragalus clarianus) - CA
08/02/95	PE	Coastal dunes milk-vetch (Astragalus tener var. titi) - CA
08/02/95	PE	White sedge (Carex albida) - CA.
08/02/95	PT	Ash-gray Indian paintbrush (Castilleja cinerea) - CA
08/02/95	PE	Vine Hill clarkia (Clarkia imbricata) - CA
08/02/95	PT	Gowen cypress (Cupressus goveniana ssp. goveniana) - CA
08/02/95	PT	Southern mountain wild buckwheat (Eriogonum kennedyi var. austromontanum) - CA
08/02/95	PE	Pitkin Marsh lily (Lilium pardalinum ssp. pitkinense) - CA
08/02/95	PE	Yadon's piperia (Piperia yadonii) - CA.
08/02/95	PE	Calistoga allocarya (Plagiobothrys strictus) - CA
08/02/95	PE	San Bernadino bluegrass (Poa atropurpurea) - CA.
08/02/95	PE	Napa bluegrass (Poa napensis) - CA.
08/02/95	PE	Hickman's potentilla (Potentilla hickmanii) - CA
08/02/95	PE	Kenwood Marsh checkermallow (Sidalcea oregana ssp. valida) - CA
08/02/95	PE	California dandelion (Taraxacum californicum) - CA.
08/02/95	PT	Hidden Lake bluecurls (Trichostema austromontanum ssp. compactum) - CA
08/02/95	PE	Showy Indian clover (Trifolium amoenum) - CA
08/02/95	PE	Monterey (=Del Monte) clover (Trifolium trichocalyx) - CA
08/09/95	PE	San Diego thornmint (Acanthomintha ilicifolia) - CA, Mexico (Baja California)
08/09/95	PE	Laguna Beach liveforever (Dudleya stolonifera) - CA
08/09/95	PE	Otay [illegible] (Hemizonia [illegible] conjugens) - CA

List of Proposed Species in Chronological Order
as of April 30, 1996

DATE PROPOSED	STATUS	COMMON NAME (SCIENTIFIC NAME) - HISTORIC RANGE
08/09/95	PE	Willowy monardella (Monardella linoides ssp. viminea) - CA
09/25/95	PE	Kuawawaenohu (Alsinidendron lychnoides) - HI
09/25/95	PE	Oha wai (Clermontia drepanomorpha) - HI
09/25/95	PE	Mapele (Cyrtandra cyaneoides) - HI
09/25/95	PE	Hau kuahiwi (Hibiscadelphus giffardianus) - HI
09/25/95	PE	Hau kuahiwi (Hibiscadelphus hualalaiensis) - HI
09/25/95	PE	Koki`o ke`oke`o (Hibiscus waimeae ssp. hannerae) - HI
09/25/95	PE	Kauai Koki`o (Kokia kauaiensis) - HI
09/25/95	PE	Alani (Melicope zahlbruckneri) - HI
09/25/95	PE	Myrsine linearifolia (Plant, no common name) - HI
09/25/95	PE	Neraudia ovata (Plant, no common name) - HI
09/25/95	PE	Kiponapona (Phyllostegia racemosa) - HI
09/25/95	PE	Phyllostegia velutina (Plant, no common name) - HI
09/25/95	PE	Phyllostegia warshaueri (Plant, no common name) - HI
09/25/95	PE	Hala pepe (Pleomele hawaiiensis) - HI
09/25/95	PE	Loulu (Pritchardia napaliensis) - HI
09/25/95	PE	Loulu (Pritchardia schattaueri) - HI
09/25/95	PE	Loulu (Pritchardia viscosa) - HI
09/25/95	PE	Schiedea membranacea, (Plant, no common name) - HI
09/25/95	PE	Anunu (Sicyos alba) - HI
09/25/95	PE	Nani wai`ale`ale, (Viola kauaiensis var. wahiawaensis) - HI
09/25/95	PE	A`e (Zanthoxylum dipetalum var. tomentosum) - HI
09/25/95	PE	Alsinodendron viscosum (Plant, no common name) - HI
09/25/95	PE	Haha (Cyanea platyphylla) - HI
09/25/95	PE	Haha (Cyanea recta) - HI
09/25/95	PE	Oha (Delissea rivularis) - HI
09/25/95	PE	Phyllostegia knudsenii, (Plant, no common name) - HI
09/25/95	PE	Phyllostegia wawrana, (Plant, no common name) - HI
09/25/95	PE	Schiedea helleri, (Plant, no common name) - HI
09/25/95	PE	Laulihilihi (Schiedea stellarioides) - HI
09/25/95	PE	Haha (Cyanea remyi) - HI
09/25/95	PE	Hau kuahiwi (Hibiscadelphus woodii) - HI
09/25/95	PE	Kamakahala (Labordia tinifolia var. wahiawaensis) - HI
09/28/95	PE	Cordia bellonis (Plant, no common name) - PR
09/28/95	PE	Nogal or West Indian walnut (Juglans jamaicensis) - PR, Cuba, Hispaniola
09/29/95	PE	Least chub (Iotichthys phlegethontis) - UT
09/29/95	PT	Atlantic salmon (Salmo salar) distinct pop. in 7 ME rivers - ME
10/02/95	PT	Guajon or rock frog (Eleutherodactylus cooki) - PR
10/02/95	PE	Nevin's barberry (Berberis nevinii) - CA
10/02/95	PT	Vail Lake ceanothus (Ceanothus ophiochilus) - CA
10/02/95	PE	Haha (Cyanea grimesiana ssp. grimesiana) - HI
10/02/95	PE	Pu`uka`a (Cyperus trachysanthos) - HI
10/02/95	PE	Ha`iwale (Cyrtandra subumbellata) - HI
10/02/95	PE	Ha`iwale (Cyrtandra viridiflora) - HI
10/02/95	PE	Fosberg's love grass (Eragrostis fosbergii) - HI
10/02/95	PE	Mexican flannelbush (Fremontodendron mexicanum) - CA, Mexico
10/02/95	PE	Aupaka (Isodendrion laurifolium) - HI
10/02/95	PE	Kamakahala (Labordia cyrtandrae) - HI
10/02/95	PE	Anaunau (Lepidium arbuscula) - HI
10/02/95	PE	Kolea (Myrsine juddii) - HI
10/02/95	PT	Dehesa bear-grass (Nolina interrata) - CA, Mexico
10/02/95	PE	Lau`ehu (Panicum [illegible]ense) - HI
10/02/95	PE	Platanthera [illegible] (Plant, no common name) - HI

List of Proposed Species in Chronological Order
as of April 30, 1996

TE PROPOSED	STATUS	COMMON NAME (SCIENTIFIC NAME) - HISTORIC RANGE
10/02/95	PE	Schiedea hookeri (Plant, no common name) - HI
10/02/95	PE	Schiedea nuttallii (Plant, no common name) - HI
10/02/95	PE	Trematolobelia singularis (Plant, no common name) - HI
10/02/95	PE	Viola oahuensis (Plant, no common name) - HI
10/02/95	PE	Achyranthes mutica (Plant, no common name) - HI
10/02/95	PE	Haha (Cyanea dunbarii) - HI
10/02/95	PE	Ha`iwale (Cyrtandra dentata) - HI
10/02/95	PE	`Oha (Delissea subcordata) - HI
10/02/95	PE	`Akoko (Euphorbia haeleeleana) - HI
10/02/95	PT	Aupaka (Isodendrion longifolium) - HI
10/02/95	PE	Lobelia gaudichaudii ssp. koolauensis, (Plant, no common name) - HI
10/02/95	PE	Lobelia monostachya (Plant, no common name) - HI
10/02/95	PE	Alani (Melicope saint-johnii) - HI
10/02/95	PE	Phyllostegia hirsuta (Plant, no common name) - HI
10/02/95	PE	Phyllostegia parviflora (Plant, no common name) - HI
10/02/95	PE	Loulu (Pritchardia kaalae) - HI
10/02/95	PE	Sanicula purpurea (Plant, no common name) - HI
10/02/95	PE	Ma`oli`oli (Schiedea kealiae) - HI
10/02/95	PE	Kamanomano (Cenchrus agrimonioides) - HI
10/02/95	PE	Haha (Cyanea (=Rollandia) humboldtiana) - HI
10/02/95	PE	Haha (Cyanea (=Rollandia) st-johnii) - HI
10/02/95	PE	Lysimachia maxima (=tenuifolia) (Plant, no common name) - HI
10/02/95	PE	Schiedea kauaiensis (Plant, no common name) - HI
10/02/95	PE	Schiedea sarmentosa (Plant, no common name) - HI
10/02/95	PE	`Akoko (Chamaesyce herbstii) - HI
10/02/95	PE	`Akoko (Chamaesyce rockii) - HI
10/02/95	PE	Haha (Cyanea koolauensis) - HI
10/02/95	PE	Haha (Cyanea acuminata) - HI
10/02/95	PE	Haha (Cyanea longiflora) - HI
10/02/95	PE	Nanu (Gardenia mannii) - HI
10/02/95	PE	Phyllostegia kaalaensis (Plant, no common name) - HI

Attachment 7. Endangered or threatened U.S. species listed as distinct population segments.

Status	Common Name (Scientific Name)	Where Listed
E	Wolf, gray (*Canis lupus*)	U.S.A., conterminous (lower 48) States, except MN and where listed as an experimental population
T	Wolf, gray (*Canis lupus*)	U.S.A. (MN)
E	Rice rat (=silver rice rat) (*Oryzomys palustris natator*)	Lower FL Keys (west of Seven Mile Bridge)
E	Bat, Mariana fruit (*Pteropus mariannus mariannus*)	Guam
E	Caribou, woodland (*Rangifer tarandus caribou*)	U.S.A. (ID, WA), Canada (that part of S.E. British Columbia bounded by the U.S.-Can. border, Columbia R., Kootenay R., Kootenay L., and Kootenai R.)
T	Bear, grizzly (*Ursus arctos*)	U.S.A., conterminous (lower 48) States
E	Warbler, nightingale reed (*Acrocephalus luscinia*)	U.S.A. (Mariana Islands)
T	Murrelet, marbled (*Brachyramphus marmoratus marmoratus*)	U.S.A. (CA, OR, WA)
T	Plover, western snowy (*Charadrius alexandrinus nivosus*)	U.S.A. (CA, OR, WA), Mexico (Within 50 miles of Pacific coast)
E	Plover, piping (*Charadrius melodus*)	Great Lakes watershed in States of IL, IN, MI, MN, NY, OH, PA, and WI and Canada (Ont.)
E	Condor, California (*Gymnogyps californianus*)	U.S.A. only
T	Eagle, bald (*Haliaeetus leucocephalus*)	U.S.A. (conterminous (lower 48) States.
E	Stork, wood (*Mycteria americana*)	U.S.A. (AL, FL, GA, NC, SC)
T	Caracara, Audubon's crested (*Polyborus plancus audubonii*)	U.S.A. (FL)
E	Rail, light-footed clapper (*Rallus longirostris levipes*)	U.S.A. only
E	Rail, Yuma clapper (*Rallus longirostris yumanensis*)	U.S.A. only
E	Kite, Everglade snail (*Rostrhamus sociabilis plumbeus*)	U.S.A. (FL)
E	Tern, least (*Sterna antillarum*)	U.S.A. (AR, CO, IA, IL, IN, KS, KY, LA Miss. R. and tribs. N of Baton Rouge, MS Miss. R., MO, MT, ND, NE, NM, OK, SD, TN, TX except within 50 miles of coast)
E	Tern, roseate (*Sterna dougallii dougallii*)	U.S.A. (Atlantic Coast south to NC), Canada (Newf., N.S, Que.), Bermuda
T	Tern, roseate (*Sterna dougallii dougallii*)	Western Hemisphere and adjacent oceans, incl. U.S.A. (FL, PR, VI), where not listed as endangered
T	Turtle, green sea (*Chelonia mydas*)	Wherever found except where listed as endangered below
E	Turtle, green sea (*Chelonia mydas*)	Breeding colony populations in FL and on Pacific coast of Mexico
T	Tortoise, gopher (*Gopherus polyphemus*)	Wherever found west of Mobile and Tombigbee Rivers in AL, MS, and LA
E	Turtle, olive (=Pacific) ridley sea (*Lepidochelys olivacea*)	Breeding colony populations on Pacific coast of Mexico
T	Turtle, olive (=Pacific) ridley sea (*Lepidochelys olivacea*)	Wherever found except where listed as endangered below
T	Turtle, flattened musk (*Sternotherus depressus*)	Black Warrior R. system upstream from Bankhead Dam
E	Salmon, sockeye (=red, =blueback) (*Oncorhynchus nerka*)	U.S.A. (Snake River, ID stock wherever found.)
T	Salmon, chinook (fall Snake R.)(*Oncorhynchus tshawytscha*)	Snake R. (U.S.A.:ID, OR, WA) mainstem and the following subbasins: Tucannon R., Grande Ronde R., Imnaha R., Salmon R, and Clearwater R.; fall run, natural populations(s), wherever found

Status	Common Name (Scientific Name)	Where Listed
T	Salmon, chinook (spring/summer Snake R.)(*Oncorhynchus tshawytscha*)	Snake R. (U.S.A.:ID,OR,WA) mainstem and the following subbasins: Tucannon R., Grande Ronde R., Imnaha R., and Salmon R.; spring/summer run, natural population(s), wherever found
T	Salmon, chinook (winter Sacramento R.) (*Oncorhynchus tshawytscha*)	Sacramento R. (U.S.A._CA) winter run, wherever found
E	Topminnow, Gila (incl. Yaqui) (*Poeciliopsis occidentalis*)	U.S.A. only

Statesman

Boise, Idaho | Monday, June 24, 1996 | 50¢

107 species lose ESA candidacy

Change doesn't signal mass recovery but new way of compiling list

By Jonathan Brinckman
The Idaho Statesman

At this time last year, lynx, wolverine, cutthroat trout and 106 other Idaho plant and animal species were candidates for federal protection under the Endangered Species Act.

Today, just four plants and animals remain.

The change does not reflect a remarkable recovery of Idaho's rare creatures. Rather, it is the result of a little-known overhaul of the way the U.S. Fish and Wildlife Service administers the Endangered Species Act.

Fish and Wildlife said the change reflects reality: Everyone knows that few of the species will ever join the 18 from Idaho that now appear on the threatened or endangered list.

But biologists, including some within the service, say the drastic cut will damage efforts to protect plants and animals.

"It removes our early-warning system," said Ted Koch, a Fish and Wildlife Service biologist in Boise.

Candidate species receive no protection under the federal act. Still, the change hurts Idaho's plants and animals in two ways, said Bob Moseley, a botanist and member of the Idaho Native Plant Society.

It already is translating into less money for efforts to keep tabs on rare species, with federal funding for plant monitoring in Idaho dropping from $34,000 last year to $8,000 this year.

Also, he said, removing candidate species means managers of national forests and other federal lands have less incentive to protect habitat those species need. If a plant is listed as a candidate species, for example, the U.S. Forest Service tries to preserve the land where it lives.

"It undermines their ability to be pro-active and get some conservation work done for these declining and rare species," Moseley said. "People will be saying, 'Why do we have to pay attention to these things at all if there's not a possibility that they will ever be listed?' "

Wayne Owen, a botanist at Boise National Forest, agrees.

"As soon as Fish and Wildlife says we're not interested in all these species, the Forest Service and the Bu-

See ESA/Page 5A

Still on the list

Four species of Idaho plants and animals remain of the 111 once under consideration for designation as threatened or endangered.

Spotted Frog

Found along streams, springs and wet meadows in the Owyhee Mountains. Common North of Snake River but disappearing from the Great Basin areas of southwestern Idaho, Nevada and Eastern Oregon.

Bull Trout

Actually a "charr," bull trout live in the Rocky Mountains and Cascade Mountains, including mountainous areas of central and northern Idaho. They need clear, cold streams with deep pools and clean gravel, a habitat threatened by exotic species and sediment from development.

Christ's Indian Paintbrush

Found only in Idaho, its entire range is 200 acres on Mount Harrison at the north end of the Albion Mountains in Cassia County. Threats are its restricted range and increasing recreational use of the mountain.

Northern Idaho Ground Squirrel

Found only in Idaho, near the town of Cambridge on the state's west side. They prefer open meadows with suitable soils, a habitat that's disappearing as a lack of fire suppression promotes the incursion of trees.

Photos courtesy: Ted Koch, Bill Mullins, Bob Moseley and the U.S. Fish and Wildlife Service

97

Statesman
6/24/96

ESA From Page 1A

reau of Land Management starts putting less effort into protecting the species," Owen said. "We start blowing them off."

The Fish and Wildlife Service said the change was needed because an unrealistically high number of species — far more than would ever gain a place on the endangered list — were recorded as candidates.

The removal of 107 Idaho species from the candidate list was part of an action announced by the service earlier this year that pared the candidate list nationfrom nearly 4,000 species to species.

It was never true that all those candidate species were going to be added to the endangered species list," said Megan Durham, a spokeswoman for the Fish and Wildlife Service in Washington, D.C. "This was a scientific scrubbing of the candidate list that was long overdue."

Foes of the Endangered Species Act say they aren't impressed by the move. They say it does not prevent the ESA from imposing draconian restrictions on logging, mining and other natural resource industries.

"I think it's more a political action than anything. It doesn't make anything less egregious at all," said Pat Holmberg, owner of placer mining operation in Idaho's Nez Perce National Forest and a leader in the Alliance of Independent Miners, which represents 35,000 miners in 39 states.

"If they were delisting species that have already been listed, I'd do some cartwheels."

The move abolished a system that put candidate species into three categories. Category one species were those for which the agency had enough information to support listing as endangered or threatened. For category two species, the service had some information indicating the species it be in trouble but not ...ough to warrant listing. Category three species were no longer considered suitable for listing.

The agency removed all species that had been classified as category two or three from the candidate list and deleted some category one species.

Idaho last year had 12 category one species, 98 category two species and six in category three.

The only species remaining on the candidate list in Idaho are the bull trout, the northern Idaho ground squirrel, the spotted frog populations south of the Snake River, and a plant called Christ's Indian paintbrush.

The loss of eight of Idaho's category one candidate species is particularly irksome to Idaho scientists. Koch, of Fish and Wildlife's Boise office, said scientists there believe all 12 species formerly in category one should remain on the candidate list.

"There's apparently a new threshold for identifying candidate species," Koch said. "We've yet to be made aware of what that threshold is."

The action is being challenged in federal court by the Biodiversity Legal Foundation, a Denver-based nonprofit group. The group maintains that as many as 9,000 species in the U.S. are in danger of extinction. It says the federal government should be listing more, not fewer, species as threatened or endangered.

"This is all part of this administration's effort to make the Endangered Species Act more user friendly, more politically palatable," said Jasper Carlton, the foundation's executive director. "Because of these policies you're going to see destruction of habitat that could have been saved and force more species into trouble."

Off the list

Once candidates for listing as threatened or endangered, these Idaho plant and animal species no longer are under consideration.

Mammals
California Bighorn Sheep
North American Lynx
North American Wolverine
Preble's Shrew
Pygmy Rabbit
Southern Idaho Ground Squirrel
Townsend's Big-eared Bat
Spotted bat
Small-footed myotis

Fish
Bonneville Cutthroat Trout
Leatherside Chub
Interior Redband Trout
Snake River Fine-spotted Cutthroat Trout
Westslope Cutthroat trout
Wood River Sculpin
Shoshone Sculpin

Reptile
Northern Sagebrush Lizard

Amphibians
Spotted Frog: main population
Tailed Frog

Birds
Baird's sparrow
Black Tern, C2...
Columbian Sharp-tailed Grouse
Ferruginous Hawk
Harlequin Duck
Loggerhead Shrike
Northern Goshawk
Trumpeter Swan
White-faced Ibis
Western burrowing owl
Mountain Quail

Clams and Mussels
California FloaterSnails
Boulder Pile Mountainsnail
Carinated Rocky (Striate Banded) Mountainsnail
Columbia Pebblesnail
Idaho Banded Mountainsnail
Lava Rock Mountainsnail
Mission Creek Oregonian
Marbled Disc
Whorled Mountainsnail

Grasshoppers
Idaho Pointheaded Grasshopper

Beetles
Blind Cave Leiodid Beetle
Idaho Dunes Tiger Beetle

Lichens
Woven spore lichen

Vascular Plants
Aase's onion
Jessica's aster
Mulford's milkvetch
Broad-fruit mariposa
Stanley whitlow-grass
Cronquist's stickweed
Bugleg goldenweed
Snake River goldenweed
St. Anthony evening primrose
Clearwater phlox
Palouse goldenweed
Salmon Twin bladderpod
Smooth stickleaf
Spalding's silene
Mourning milkvetch
Wavy-leaf thelypody
Alkali primrose
Barren milkvetch
Davis' waxwing
Guardian buckwheat
dano douglasia
Bartonberry
Broad flesbane
Bruneau River prickly phlox
Cache Penstemon
Centennial rabbitbrush
Clustered lady's slipper
Crenulate moonwort
Cusick's false yarrow
Davis' peppergrass
Douglass' wavewing
Goose Creek milkvetch
Hazel's prickly phlox
Howell's gumweed
Idaho penstemon
Least phacelia
Lemhi penstemon
Meadow pussytoes
Obscure phacelia
Osgood Mountains milkvetch
Out-of-tune sticky tofieldia
Owyhee clover
Payson's milkvetch
Salmon River fleabane
Slick spot peppergrass
Stalk-leaved monkey flower
Tobias' saltforge
Triangular-lobed moonwort
White Clouds milkvetch
Yellow spring-beauty
Indian Valley sedge
Vivid green aster
Bank monkeyflower
Cascade meesmas
Murphy milkvetch
Rydberg's mustneon

Testimony of

Steve Paulson

of the

National Association of Home Builders

Before the

House Committee on Resources

on the

Endangered Species Act

June 25, 1996

Good morning. My name is Steve Paulson and I am a member of the National Association of Home Builders, also known as NAHB. I am here to testify on behalf of NAHB's 185,000 member firms, who employ over seven million people. I have been asked by NAHB to testify on their behalf for two reasons. First, I have extensive hands-on experience with the implementation of the Endangered Species Act in Austin, Texas as well as in other areas of the country. As a principal with SWCA, Inc. my job is to help builders comply with the Endangered Species Act. SWCA has prepared more habitat conservation plans than any other group in the country. We have also conducted extensive research on many endangered and threatened species. Second, I have spent the past two years on NAHB's Endangered Species Act Working Group. The mission of the Working Group is to become the industry's experts on the ESA and, as such, understand the relationship between the legislative language Congress enacted and federal agencies' interpretations of this language as embodied by regulation and agency guidance.

I believe that the listing process is the vulnerable underbelly of the Endangered Species Act. Currently, controversial decisions taint the listing process. Until Congress and the Fish and Wildlife Service can design a listing process that is based on sound and reliable scientific data, and carefully established guidelines, the entire Act will be vulnerable to attack from all sides.

The listing of the Golden-cheeked Warbler as "endangered" illustrates some

of the flaws of the current listing process. The Act's language is insufficient to guide the Fish and Wildlife Service in their listing decisions. Accordingly, the agency routinely renders questionable listing decisions with little basis in science. The listing process also does not provide adequate public notice and participation opportunities.

The December 1990 emergency listing of the Golden-cheeked Warbler as "endangered" exemplifies the sparse and questionable data upon which FWS routinely relies. In the *Federal Register* listing notice for the warbler, the agency stated that it had conducted a "thorough review of all information available." In reality, the Service's listing was based on a single report by Wahl, et. al. which was commissioned by the Texas Parks and Wildlife Department. The Wahl report theorized that habitat modification and fragmentation was causing warbler populations to decline. However, during the listing process, biologist Warren Pulich, a pre-eminent scholar on the warbler at the time, raised serious questions regarding the validity of the Wahl report. In a letter to the Fish and Wildlife Service, Dr. Pulich stated that the Wahl research countered "sound ornithological practices" and that the petition did not provide sufficient evidence to determine the warbler's status.

Dr. Robert Benson, a professor at Texas A&M University, also believed that the scientific data presented by Wahl was insufficient to indicate that the warbler was endangered. The analyses used by Wahl and accepted by the Fish and Wildlife Service were based on preliminary extrapolations of data from other

species in other habitats and simple population models based on many untested assumptions. Dr. Benson concluded that habitat fragmentation alone did not have a significant impact on the warbler. Dr. Benson's research indicated that small patches of habitat are not inferior to large patches as suitable warbler habitat. Consequently, habitat fragmentation would not have a significant impact on warbler populations. The Fish and Wildlife Service, however, relied exclusively on Wahl's contention that the Golden-cheeked warbler did not occupy patch sizes of habitat which are less than 50 hectares (123.5 acres), a contention we now know not to be true.

The agency cited "habitat loss and fragmentation" in the listing rule as the primary threat to the species' survival. The agency even listed the warbler on an emergency basis because of habitat loss. An environmental organization invoked the Act's emergency listing procedures through one sentence, added post-script, to a letter written to Austin's Fish and Wildlife Service office. According to the letter, an unidentified source close to the environmental group expressed a belief that the warbler's existence was jeopardized based on a single landowner's attempt to clear his property. This was enough to spur Fish and Wildlife Service into action. The agency determined there was an emergency "posing a significant risk to the well-being of the [warbler]." The warbler's listing became effective immediately under the Act's emergency procedures, thus suspending normal rule-making requirements and the opportunity for public comment. There were actually only two instances of habitat clearing, totaling 220 acres. This accounted for less than one-hundredth of the estimated habitat within the range of the

warbler. It is highly doubtful that a negligible loss of habitat could constitute an imminent threat warranting the warbler's emergency listing and justify the abandonment of normal rule-making procedure.

The listing of the warbler also exemplifies how the public, especially impacted landowners, are excluded from the decision-making process. The Wahl study used by the Fish and Wildlife Service to justify the emergency listing was not available to the general public prior to either the emergency or the proposed rule, despite the fact that the study was funded by ESA Section 6 funds. Several environmental organizations, however, had the opportunity to read and review the report.

Although I have focused on the example of the Golden-cheeked Warbler, there are many more illustrations of the problems with the listing process. In Austin alone, we face the specious listing of the Barton Springs Salamander and the procedurally defective and scientifically deficient listing of the cave bugs.

Congress must ensure that the Act's significant protections are extended only to those species which are truly in danger of extinction. There are several means of accomplishing that goal.

First, Congress should direct FWS to establish specific criteria for listing species which contain consistently applied guidelines. The first step in this process should be to develop a more specific and useful definition of endangered

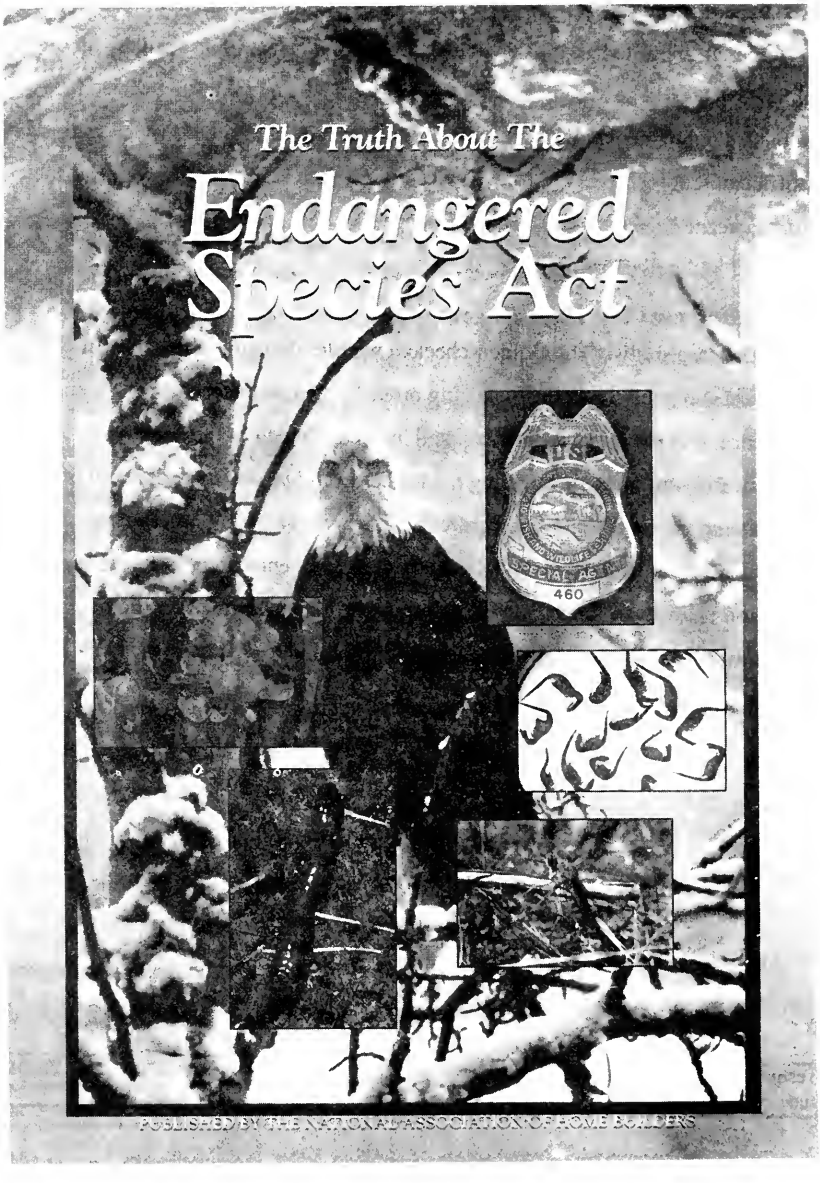
species. As currently written, an "endangered" species is defined simply as "a species in danger of extinction throughout all or a significant portion of its range." This definition gives the FWS far too much latitude. It is so vague that virtually any species could be considered "endangered."

Second, Congress should improve the scientific data upon which listing decisions are made. A petitioner should bear the burden of proving that the species is endangered or threatened. Congress should require a listing petition to contain "substantial scientific or commercial data." Further, the Act should define specific standards and requirements for what constitutes "substantial information." Field testing should be required to verify the data used in the listing process. It should not be sufficient to list a species by theorizing the historical loss of habitat. Congress should also direct Fish and Wildlife Service to arrange for independent peer review of the data and rationale used in the listing process. Fish and Wildlife Service claims that many recent listings are subject to peer review. Closer examination of that peer review indicates that the original petitioner can be one of the reviewers, and that the peer review is limited to the information presented in the proposed listing rule.

Third, Congress should open the listing process to public review and participation. The general public does not read the *Federal Register*. Even if they did, once a listing is proposed there is insufficient time for interested parties to evaluate the biological data in any meaningful way. Congress should require the Fish and Wildlife Service to provide public notice of listing petitions to local

officials within the species' range. Congress should also require that the raw data and research submitted as "proof" that a species is endangered is available to the public. This could be accomplished by requiring Fish and Wildlife Service to establish a public docket with all of the information on a particular species. It is insufficient that Fish and Wildlife Service merely provides a summary of the data in the *Federal Register*. The results of the peer review process should also be published in the *Federal Register*.

The case study of the Golden-cheeked warbler dramatizes the scientifically-haphazard and publicly-exclusive listing process. Unfortunately, in my extensive experience, it is not a dramatic or isolated incident. Much of the negative publicity and sentiment surrounding the Endangered Species Act arises out of the faulty listing process. Failure to correct the flaws in the listing process may eventually turn the public against the laudable goal of endangered species protection. However, the legislative reforms that I have outlined can help transform the Act into model and efficient legislation.


The Truth About The
Endangered
Species Act
U.S.
SPECIAL AGENT
460
PUBLISHED BY THE NATIONAL ASSOCIATION OF HOME BUILDERS

THE TRUTH ABOUT...

A message from Randy Smith
1996 President, National [illegible] Home Builders

REFORMING THE ENDANGERED SPECIES ACT

Like most Americans, builders know that protecting endangered species is the right thing to do, a vital step in preserving the living natural world. Builders and developers also know something else, something a majority of Americans don't know - the environmental law that is supposed to save endangered species, the Endangered Species Act (ESA), is not working.

The current act is inflexible, has resulted in few species being "saved," and forces private landowners to pay the financial burden of species protection measures that are supposed to be a public responsibility.

Somewhere along the way, the regulations that comprise the ESA began to be used as a tool to stop legitimate land use, raising the ire of landowners everywhere.

Sam Hamilton
FWS, Atlanta, GA
"The incentives are wrong here. If I have a rare metal on my property, its value goes up. But if a rare bird occupies the land, its value disappears. We've got to turn it around to make the landowner want to have the bird on his property."[1]

The ESA's punitive nature punishes good stewards of wildlife by threatening to take away the use of their land if a threatened or endangered species is discovered on their property. Now, as Congress debates how to reauthorize the country's most powerful environmental law, the situation has gone from bad to worse, in large part because of the refusal of some to compromise. The problem is that some people are more interested in saving the Act than in saving species.

In nearly every corner of the country, private land has been held hostage by the federal government, either because an endangered or threatened species was discovered, or the land was deemed to be either current or potential habitat for a species. Landowners have been prevented from building homes, harvesting trees, planting crops and in some cases, even walking on their property. Furthermore, landowners who lose use of all or part of their property due to the ESA have rarely received compensation.

Unfortunately, most Americans have little knowledge of how, or even if, the ESA works. Nor are they aware that private property owners have been compelled to pay the lion's share of expenses associated with protecting species. Essentially, in the 25 years since the Act was passed, species protection has been privately, not publicly, financed.

Many of the protected "species" are in fact, subspecies. Often, they are isolated populations that differ in minuscule ways from their more proliferate cousins in other areas of the country or world.

To make matters worse, there are many examples of species being added to the endangered or threatened lists not on the basis of scientific evidence, but as a way to stop growth.

In short, the ESA is being used either ineffectively (few species being saved) or inappropriately (i.e., to stop growth).

Fifth Amendment of the U.S. Constitution:
"nor shall private property be taken for public use, without just compensation."

The U.S. Fish and Wildlife Service is queuing up species for a federal agency list, but not ponying up the dollars and taking care of the problem.

Sooner or later we will have to ask ourselves are we truly getting the most species protection for our money out of the ESA?

Clearly, reform is needed if the Act is to be successful in saving species. If private property is devalued for the public good, the issue of compensation must be addressed. Other solutions to make the ESA work better include:

- Focusing attention and resources on the species that are truly endangered
- Using sound, defensible scientific research to make species listing decisions
- Streamlining the permitting process. If the administrative time invested by a landowner is shortened, financial resources could be freed up and used for habitat preservation efforts.
- Designating the critical habitat of an endangered species well in advance, so that landowners know what areas can be developed, and what areas can't.

1 Betsy Carpenter, "The Best-Laid Plans" U.S. News and World Report, Vol 115, No. 14 10/4/93

Why the Country's Most Powerful Environmental Law IS NOT WORKING

- Defining what constitutes "take" under the Fish and Wildlife Service's definition of "harm" to a species, so that landowners will not run the risk of violating the law unknowingly
- Requiring the U.S. Fish and Wildlife Service to develop and implement recovery plans on a timely basis, so that species do not languish on the endangered and threatened lists
- Allowing land exchanges so that valuable habitat can be preserved without sacrificing economic development

Ultimately, making a reformed Endangered Species Act work will require a nationwide public-private joint venture never seen before in the annals of environmental problem-solving. Under the current act, landowners have been singled out to comply with restrictive land use regulations for a program that has saved a half-dozen charismatic species and little else.

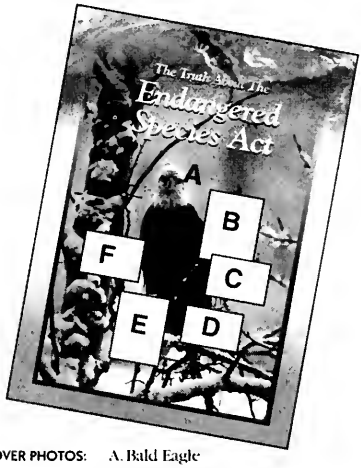
Justice Holmes in PA Coal v. Mahon 1922
"while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

This is no reasonable way to protect the habitat of plants, fish, wildlife or humans.

As for the truth about the Endangered Species Act, the truth is that there are no easy answers. With this publication, the National Association of Home Builders (NAHB) hopes to focus the ESA debate on facts rather than fiction and move toward a solution that keeps the original intent of the ESA, but does not run roughshod over the constitutional rights of America's landowners. ▲

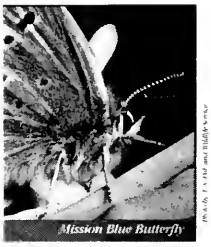
Michael Bean, Environmental Defense Fund

"Despite nearly a quarter century of protection as an endangered species, the red-cockaded woodpecker is closer to extinction today than it was a quarter century ago when the protection began"



COVER PHOTOS:
A. Bald Eagle
B. Special Agent Badge
C. Fairy Shrimp*
D. Delhi Sands Flower Loving Fly
E. Red Hills Salamander
F. Green Pitcher Plant

*shown in petri dish



Major Provisions of the Act . . .

Saving Species Or Stopping Growth?

In theory, the ESA is simple. Species determined by the Fish and Wildlife Service to be in danger of extinction are placed on a list to be protected, monitored, recovered, then removed from the list. Despite its good intent, the law has become a lightning rod for controversy and has caused huge problems for private property owners.

As more and more species are added to the list and few are removed, the intent of the law is becoming obscured. Disagreement over how the listing process works, which species or subspecies should be included and the validity of the science used to determine listing eligibility are at the center of the debate.

Private property owners charge that they are left out of the process, but counted on to foot the bill for what is a common good. Rather than enlisting landowners' help in saving species, the Act pits species against landowners. It is a law that can affect anyone who owns or plans to own property, particularly if you want to build on or otherwise alter your property.

The teeth of the law are the three main legislative sections which tend to be the focal points of debate. (See illustration). Adherence to these legislative sections makes the law absolute and inflexible. Individuals can use the ESA to stop any development project by petitioning to have a plant or species listed as endangered or threatened.

Listing (Section 4)
Section 4 mandates that species be listed as endangered or threatened "solely on the basis of the best available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts of such determination." The cost of protecting species may not be considered.

Jeopardy Prohibition (Section 7)
Section 7 requires federal agencies to insure that the actions they authorize, fund, or carry out neither jeopardize the continued existence of a species nor modify habitat that is critical to its survival

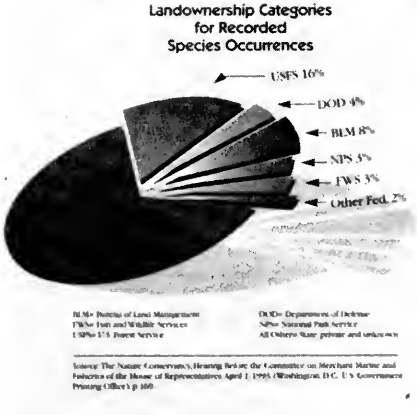
Take (Section 9)
Section 9 states that no person may take an endangered animal species, where "take" may mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct." Thus property owners who alter their property and disrupt the behavior patterns of species listed as endangered or threatened are guilty of "taking" such species and are in violation of the ESA.

Q Why should an average landowner be concerned about the ESA?

A

Landowners should be concerned because the law can restrict what they can do with their land if an endangered or threatened species is discovered there or if their land is declared habitat. Once a species is listed, the ESA, as interpreted by the Fish and Wildlife Service (FWS), calls for FWS biologists to control how land is used any time they consider it important for listed species. The FWS decides whether farming, logging, building or even walking will be allowed. On such land, private or public, the FWS biologists become, in effect, land managers on behalf of the listed species. (The National Marine Fisheries Service has responsibility for ocean-going fish.) Landowners who want to use their land must foot the bill for habitat conservation efforts. Current law does not provide compensation for the affected landowner.

The Northern Spotted Owl, which virtually closed down timber harvesting in the Pacific Northwest, is merely a subspecies of the spotted owl. Even so, landowners were required to set aside 80 acres for each pair of owls.

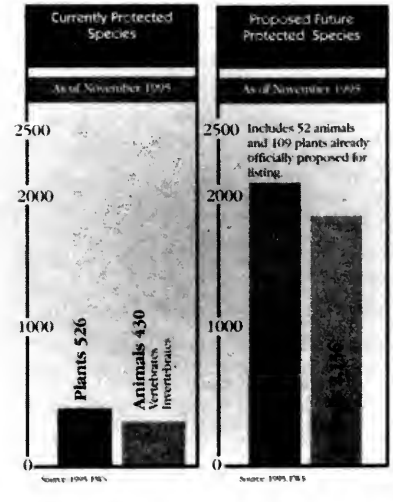


BLM= Bureau of Land Management
FWS= Fish and Wildlife Services
USFS= U.S. Forest Service

DOD= Department of Defense
NPS= National Park Service
All Others: State, private and unknown

Source: The Nature Conservancy, Hearing Before the Committee on Merchant Marine and Fisheries of the House of Representatives April 1, 1993 (Washington, D.C.: U.S. Government Printing Office) p. 169.

What's Endangered



Q How costly is the ESA to administer?

A

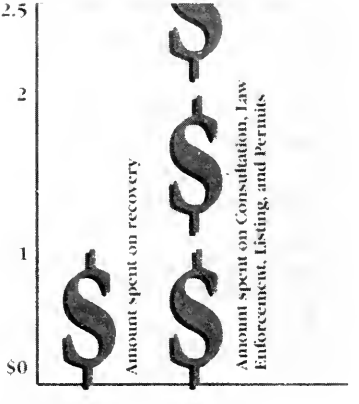
In 1990, the Inspector General of the Department of the Interior estimated the cost of recovering all presently known species at $4.6 billion. This figure may be extremely low for two reasons. First, it assumes a $2 million recovery cost per species estimate. (Cost estimates for recovering the northern spotted owl alone start at $21 billion.) Furthermore, the $4.6 billion estimate is for recovery costs alone. However, the money spent by the federal government is overshadowed by the huge economic impact of a few endangered species on the private sector.

"Top Ten" Most Expensive Recovery Plans Instituted Under The ESA*

1)	Atlantic Green Turtle	$88,236,000
2)	Loggerhead Turtle	$85,947,000
3)	Blunt-Nosed Leopard Lizard	$70,252,000
4)	Kemp's Ridley Sea Turtle	$63,600,000
5)	Colorado Squawfish	$5[illegible]0,000
6)	Humpback Chub	
7)	Bonytail Chub	
8)	Razorback Sucker	
9)	Black-Capped Vireo	$53,538,000
10)	Swamp Pink	$29,026,000

* Information provided by the National Wilderness Institute

FWS Spending On Endangered Species



For every dollar FWS spends on recovery, it spends $2.26 on consultation, permitting, law enforcement and listing.

Q Who decides which species will be listed on the threatened or endangered list?

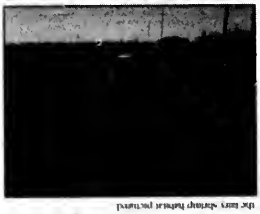
Tadpole Fairy Shrimp magnified 100X.

Which photos depict areas determined to be vernal pools (shallow pools of water that serve as breeding areas and critical habitat) for the fairy shrimp by FWS?

a.

b.

c.



All of the Sacramento (CA area shown in your declared fairy shrimp habitat by FWS. The Sacramento Metropolitan Utilities District (SMUD) was required to set aside 356 acres of land at a cost of $40,000 to mitigate 2 acres of the fairy shrimp habitat pictured.

ANSWER

A

Any individual can petition the U.S. Fish And Wildlife Service to list a species. Once a species (or subspecies) has been proposed for listing, the Secretary of the Interior (or Secretary of Commerce) has 90 days to determine whether the petition includes enough information to warrant a formal review of the species' status. Although the statute calls for a decision whether or not to list within a year, the law is rarely followed. If a species is determined to be at immediate risk, an emergency listing may be authorized.

19 November 1990

Dr. Wayne S. White
Sacramento Field Office
U.S. Fish and Wildlife Service
2800 Cottage Way, Room E-1823
Sacramento, CA 95825

Dear Mr. White

I hereby petition the U.S. Fish and Wildlife Service to list the Conservancy fairy shrimp (*Branchinecta conservatio*), vernal pool fairy shrimp (*Branchinecta Lynchi*), longhorn fairy shrimp (*Branchinecta longiantenna*) and the California lindenella (*Linderiella occidentalis*) as endangered species pursuant to Section 4 of the Endangered Species Act of 1973, as amended. These animals are endangered throughout their ranges by urban development agricultural land conversion and other activities that adversely impact their vernal pool habitat.

Thank you very much for your prompt attention to this petition.

Sincerely Yours,

Roxanne Bittman
Davis, CA

Although the government may spend thousands of dollars to process a petition, no scientific background is necessary for someone to petition a listing, and minimal information is required. The above letter was all FWS needed to begin the process for listing the fairy shrimp, whose subsequent listing resulted in millions of dollars of lost revenue for landowners.

Q Has the Endangered Species Act been successful in saving species from extinction, thus protecting and preserving biodiversity?

A If the Act were truly aimed at preserving possible scientific benefits from biodiversity, then it would be implemented to provide equal protection for all species, regardless of their popular appeal. In 1990, over half of the $100 million spent by state and federal governments to protect endangered species went to only 11 species, less than 2 percent of the species listed. These charismatic species tended to be warm and fuzzy animals that are favored by the American public, including the grizzly bear, the northern spotted owl, the bald eagle and the Florida panther.

1,520 Species Listed

19 Species Removed and Only 4 Recovered

Bald Eagle

Florida Panther

Grizzly Bear

Since 1966, 1,520 species, 956 native to the U.S. and 564 foreign species, have been listed as endangered or threatened. Of these, only 19 species have been de-listed: seven, because they became extinct; eight because of listing errors; and four due to recovery.

Case Studies

Tim McWilliams at Martesia

MARTESIA PLANNED COMMUNITY & THE FLORIDA SCRUB JAY LISTING

"It was hell on earth. We were up against financial ruin, with no rules to play by. The only thing we were sure of was that we couldn't build."

That's how Brevard County, FL, home builder and developer Tim McWilliams describes the ordeal he went through when the land he was developing — with many homes under construction — was deemed habitat for the threatened Florida Scrub Jay by the U.S. Fish and Wildlife Service.

The Scrub Jay was listed as threatened by the U.S. Fish and Wildlife Service (FWS) in 1987 based on a petition request submitted by a graduate student at the University of Florida. The bird has never been listed by the state of Florida.

In its legally required public notice, FWS stated that the listing of the Scrub Jay would have "little or no effect on private property owners."

In reality, the listing has the potential to cost Brevard County property owners hundreds of millions of dollars, and it's conceivable that some new homes in Brevard County with scrub habitat on their property will jump in price by $20,000. Some 25,000 people located within 500 feet of the habitat are affected, and 8,000 parcel owners who have habitat on their property are required to go to the FWS for a Section 7 permit.

In 1991 FWS visited Martesia and determined the site had habitat and birds. FWS notified Indian Harbor Beach and other municipalities to stop issuing permits and stop construction. The same restriction applied for the 14,000 acres of privately held habitat throughout the county.

For McWilliams, the fact that the Fish and Wildlife Service shut down his development project *after* infrastructure had been put in was extremely frustrating. "By 1990, we had all the necessary state and local permits and environmental approvals. We were under construction, we had the streets finished and, out of 121 lots, we had closed approximately 80 lots. Twenty of those were in various stages of construction, ranging from families living there to groundbreaking. The other 60 were close to being started."

Equally frustrating — and chaotic — was the lack of evidence on how many birds, if any, were being impacted by the development. "We spent $20,000 to have a biologist use taped mating calls to survey our 50 acres and we found that 6 birds were using the property, but not necessarily living on it. I had 80 lot owners and a developer involved in the issue who had no idea what was necessary, and FWS didn't know what it wanted to do either."

Brevard County tried to address FWS' listing concerns by drafting a Scrub Jay ordinance, but the measure met with stiff opposition from builders and environmentalists alike. Then a task force that included local home builder representation by McWilliams spent four years trying to craft a habitat conservation plan (HCP).

Many builders and landowners opposed one early plan because it required landowners and builders to pay a $5,500 one time assessment fee per acre, plus $100 a year per acre for 30 years for maintenance, even though that was only 25% of the actual mitigation cost. "You have a big problem in that a lot across the street, without scrub habitat, would not have a fee while your lot, with scrub habitat, would. So you have a discrepancy in the market and some landowners would suffer accordingly."

"The reality is it comes down to money. Once you get through the details and it's worked out, you still haven't answered the question of who is going to pay the $100 million needed for this HCP."

The Scrub Jay incident has left McWilliams increasingly leery of habitat conservation plans. "In theory, it's a great idea, because you work to balance environmental and development issues. The reality is it comes down to money. Once you get through the details and it's worked out, you still haven't answered the question of who is going pay the $100 million needed for this HCP," McWilliams says.

Since 1991, the mitigation ratio for the Florida Scrub Jay habitat has gone from 15% to 400%. In 1991 a builder could set aside as little as 15% of the lot itself for on-site mitigation; in 1995 the mitigation requirement is to set aside four entire lots.

McWilliams' experience with authorities over the Florida Scrub Jay listing has given him a unique perspective on the need for ESA reform. "Either they should let me develop my land, or if the authorities tell me not to develop it, that land should be purchased by the state or federal government." A better act, he says, would emphasize public land acquisition. "If the honest goal of the ESA is long-term preservation of habitat, why not be honest about what it takes to do that? Our best shot at protecting species is by buying the land for the people at market value from the landowner and setting it aside in perpetuity as habitat for the species.

"The current act simply has no regard for economic impact," McWilliams says. "One minute I'm building homes and helping families realize the American dream of home ownership, the next minute I'm shut down and wondering if I'm ever going to be able to build homes again." ▲

Mike Winn of Natomas

'GREENLINING' IN CALIFORNIA: THE GIANT GARTER SNAKE LISTING

In Sacramento, CA, building homes under the current Endangered Species Act is like playing "land use roulette," according to builder Mike Winn. In this game, however, "you try to play by the Fish and Wildlife Service's rules and find out that they've changed the rules, or they have their own set of rules and another set that apply to the rest of the world."

In the early 1990s, Winn's company, Winncrest Homes, had the misfortune of owning land that became the target of no-growth activists. The resulting controversy, brought on by the ESA listing of the Giant Garter Snake, has cost Sacramento landowners $2 million. What's worse, as of December of 1995, an equitable solution is nowhere in sight.

The Giant Garter Snake had been protected under state law since 1971, when California's Department of Fish and Game identified the reptile as "threatened." Twenty years later, as residential growth increased in Sacramento and Sutter Counties, the U.S. Interior Department's Fish and Wildlife Service proposed to put the snake on its ESA list of threatened species as well. According to Winn, if it hadn't been for Winncrest's proposal to develop Natomas, a master-planned community in the high-growth area of Sacramento, "we never would have seen this listing. The ESA is like an effective, last-ditch effort that no-growth activists can use as a weapon as development reaches the entitlement process."

Working through a private sector coalition known as the North Natomas Landowners Association (NNLA), Winncrest Homes helped raise $1 million to fight the listing of the snake. To shed some truly scientific light on the situation, NNLA hired a respected biology consulting firm, Pacific Environmental, to oversee what was later called by independent researchers "the most thorough scientific study ever done on the Giant Garter Snake species."

The biological study data showed no evidence to suggest the snake's population was declining. If anything, evidence suggested the exact opposite was occurring — that the snake was thriving, and that its range was well beyond the Sacramento region, extending into Redding and Fresno, California.

Unfortunately, North Natomas' strong scientific data lost out to government opinion. "We said all along that this listing decision should have been made simply on the strength of whatever the scientific data showed. If the data did not provide sufficient evidence of endangerment, then the rule for the proposed listing of the snake should have been withdrawn," Winn said. "But the Fish and Wildlife Service field staff ignored our data, and substituted unsupported opinions. It's really criminal what happened. Fairness and the role of science were just tossed aside."

With the dubious listing of the Giant Garter Snake as a threatened species, Winncrest's land use problems were just beginning. Under ESA regulations, the company had to develop a habitat conservation plan and pay for the biological, legal and economic reports that would be the basis of the plan. "Basically, we spent $1 million to fight a questionable species listing, and then when we lost, we had to spend $1 million more to develop a habitat conservation plan."

Four years after the snake controversy began, Winn and his company are still not out of the woods. As of December of 1995, the company's year-old habitat conservation plan has been reviewed by three counties, numerous farm groups, countless concerned citizens and area environmentalists and revised three times, with no hope of approval in sight.

Looking back on the controversy, Winn says the most frustrating thing for his company during the entire Giant Garter Snake listing problem was the fact that Winncrest had been working with local authorities to do the right things all along

"The ESA is like an effective, last-ditch effort that no-growth activists can use as a weapon as development reaches the entitlement process"

by submitting proposals to conserve open space and provide natural amenities. "Then the Feds came in and attempted to list the species. If the local authorities had denied approval of these developments, I'll bet the Feds never would have listed the snake. Listings tend to pop up wherever the growth is imminent," Winn said.

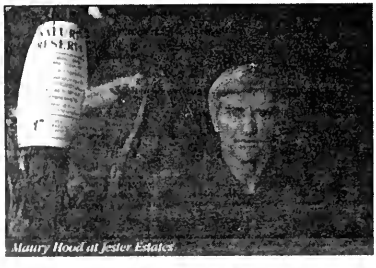
What did Winn learn from the experience? For one thing, never to underestimate the power of a government agency. "As soon as the federal government gets a species in the listing process, it's very difficult to reverse the direction. The current law allows FWS to be both judge and jury."

Winn calls himself a realist. His hope as Congress undertakes ESA reform is simply the passing of a law that makes

the best scientific evidence become the leading factor in any decision to protect a species. He also thinks clear guidelines for habitat conservation planning are essential in endangered species law.

"The Endangered Species Act was full of good intentions when first enacted," Winn says, "but it's allowed bureaucrats to gain control, and get out of control. We have an environmental law that is being used to stop responsible growth," he says.

The result is something Winn calls "greenlining" — a political and regulatory manipulation of an environmental law whereby no-growth activists, through the U.S. Fish and Wildlife Service, will list a species whose range and habitat is in an area experiencing growth, without the scientific data to back up the claim. ▲



Maury Hood at Jester Estates

JESTER ESTATES AND THE GOLDEN-CHEEKED WARBLER LISTING

In Texas, the Endangered Species Act (ESA) has taken thousands of acres out of the hands of private owners. In Austin, that is exactly what happened to developer Maury Hood of Jester Development Company.

Jester Development was at the center of an emergency listing of the Golden Cheeked Warbler by the U.S. Fish and Wildlife Service (FWS). The listing caused a land use nightmare that cost Hood and his partners $8.5 million, considerable damage to his construction equipment by environmental activists, and the foreclosure of his development project by banks.

In 1983, Jester Development began work on Jester Estates II, which consisted of approximately 1,100 dwelling units on 630 acres. In March of 1990, Hood's company got a development permit from the City of Austin to begin construction on Section 5 of Jester II, and began clearing the centerlines of the streets and some of the undergrowth around a particularly spectacular stand of oaks. The clearing resulted in immediate protests from environmental activists.

On May 5, 1990, the FWS granted an emergency listing for the Golden-cheeked Warbler, a small songbird whose critical habitat includes 33 Texas counties. The warbler breeds in Texas every year from March 15 to July 15, and spends the remainder of the year in Guatemala and Mexico.

In addition to complying with U.S.Army Corps of Engineers Section 404 permitting requirements, Jester was required to obtain a Section 7 permit from FWS pursuant to the ESA. Jester applied for the permit in May 1990. Partial release of the property was granted in late September for some developed lots, but the undeveloped lots were not released.

In December of 1990, Jester met with FWS and the Corps to re-initiate the Section 7 consultation process and free up the remaining lots. FWS requested that Jester undertake two years of warbler surveys — surveys that were only acceptable for review if they were conducted between March 15 and May 20 of each year, due to mating habits of the bird.

In an effort to legitimately prove that its development work was not harming the bird, Jester hired an independent biology research firm to survey the creature's habitat. In May of 1991, after conducting a study that showed that no warblers existed within 500' of the subject property, Jester made a formal written request for release of the property (approximately 65 acres and 135 lots.) In its request, Jester pointed out the survey results suggested the bird didn't need as much space to nest as environmentalists would lead the public to believe. In fact, Jester's survey showed warblers were nesting within 150 feet of four-year-old homes in Jester Estates I, a previous Jester Development community.

When the release had not been received by October of 1991, Jester partners began meeting on a weekly basis with FWS to try to expedite a release. FWS finally released the property on March 2, 1992.

It had taken six months of Jester Development's playing by the rules to receive final approval for development from FWS. But in the total 18 months the Fish and Wildlife Service had locked up its land and thus shut off income streams from the property, the company's financial obligations had mounted. On March 2, the day FWS released the Jester property, Texas Commerce Bank foreclosed on the land.

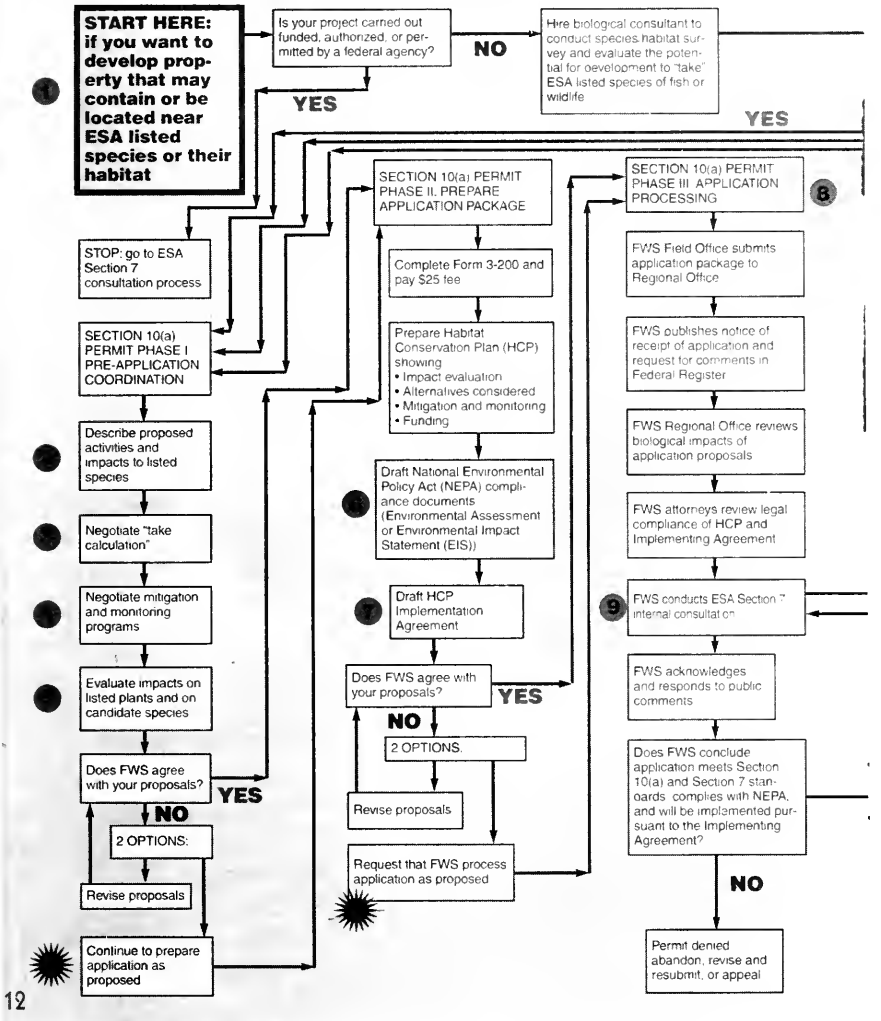
The bank has since sold the 65 acres. The lots have been developed by other developers and builders, and only a few remain without homes. In January of 1995, the remaining undeveloped lots were sold as a preserve for $5,400 per acre, roughly $16,800 less than what the Appraisal District valued the property at in 1988.

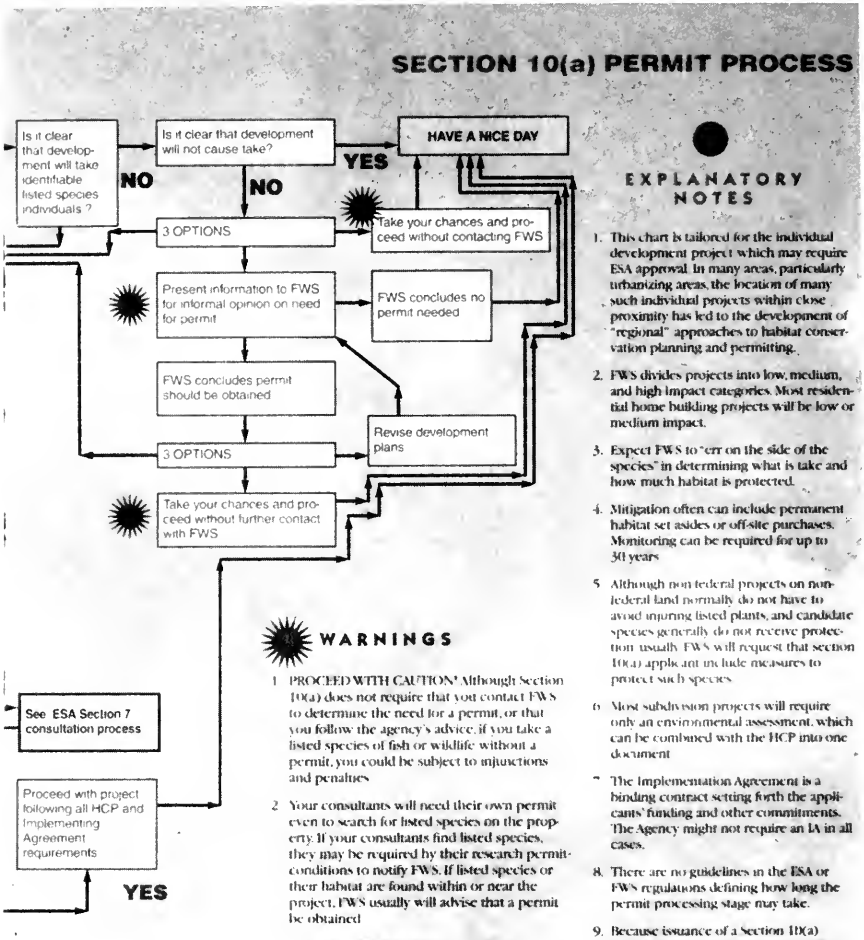
"Some people will do whatever they can to stop you from developing your land," Hood says. "We had demonstrated [to the Fish and Wildlife Service] that there weren't any birds or bird habitat on that land. And yet it still took them 18 months to release the land. I don't think a single golden cheeked warbler was saved by their withholding the permit."

Austin's tax base suffered as a result of the Jester land being held hostage as well. The appraised value on non-released developed lots plummeted from $35,000 to $6,500 and the acreage value from $15,000 per acre to $2,000 per acre.

"Some people will do whatever they can to stop you from developing your land," Hood says. "We had demonstrated [to the Fish and Wildlife Service] that there weren't any birds or bird habitat on that land. And yet it still took them 18 months to release the land. I don't think a single golden cheeked warbler was saved by their withholding the permit." ▲

Navigating the ESA permit process





Sources:
Note that neither Section 10(a) of the ESA nor the FWS's regulations on Section 10(a) permits defines a permitting procedure. The flow chart is derived mainly from FWS's informal Preliminary Draft Handbook for Habitat Conservation Planning and Incidental Take Permit Processing, and the experiences of builders who have obtained Section 10(a) permits.

Navigating the ESA permit process

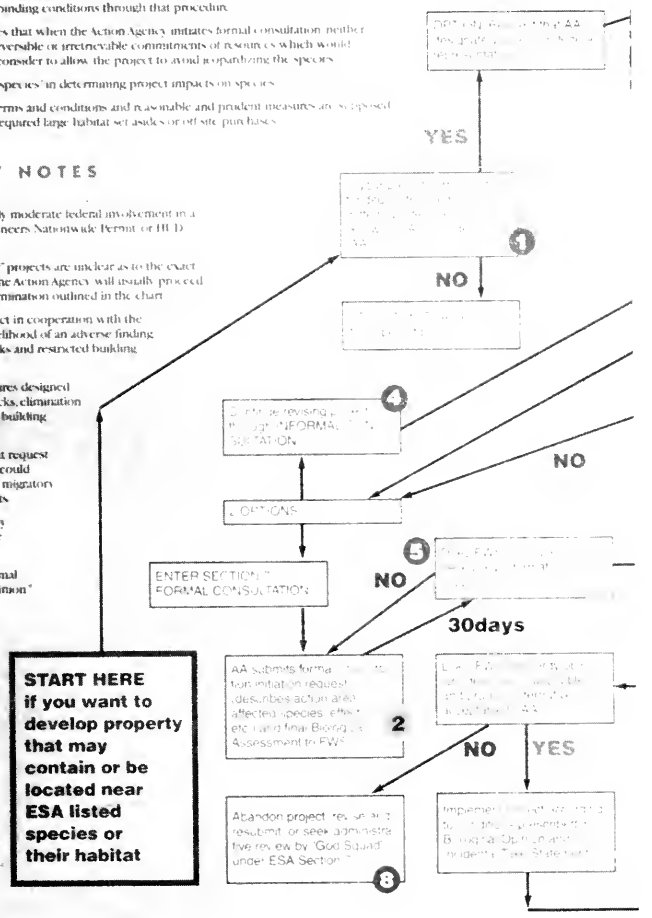
WARNINGS

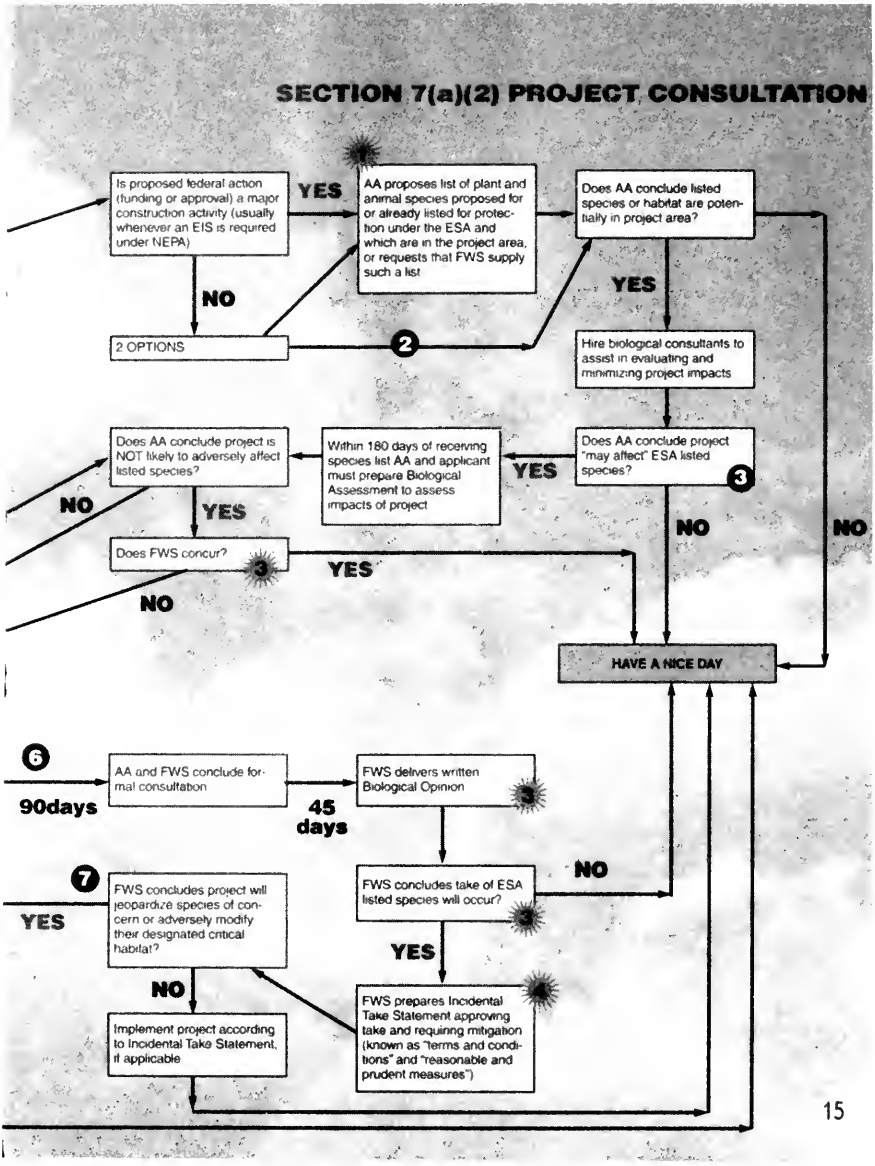
1. Unlike the take prohibition found in Section 9, the Section 7 prohibition of jeopardy applies to plant species. Also, species which are proposed for listing must be the subject of a "conference" between the action agency and FWS, though FWS can impose no binding conditions through that procedure.
2. STOP ALL WORK! Section 7(d) requires that when the Action Agency initiates formal consultation, neither it nor the applicant may make any irreversible or irretrievable commitments of resources which would foreclose the alternatives FWS might consider to allow the project to avoid jeopardizing the species.
3. Expect FWS to "err on the side of the species" in determining project impacts on species.
4. Although FWS regulations state that terms and conditions and reasonable and prudent measures are supposed to be minor in scope, often FWS has required large habitat set-asides or off-site purchases.

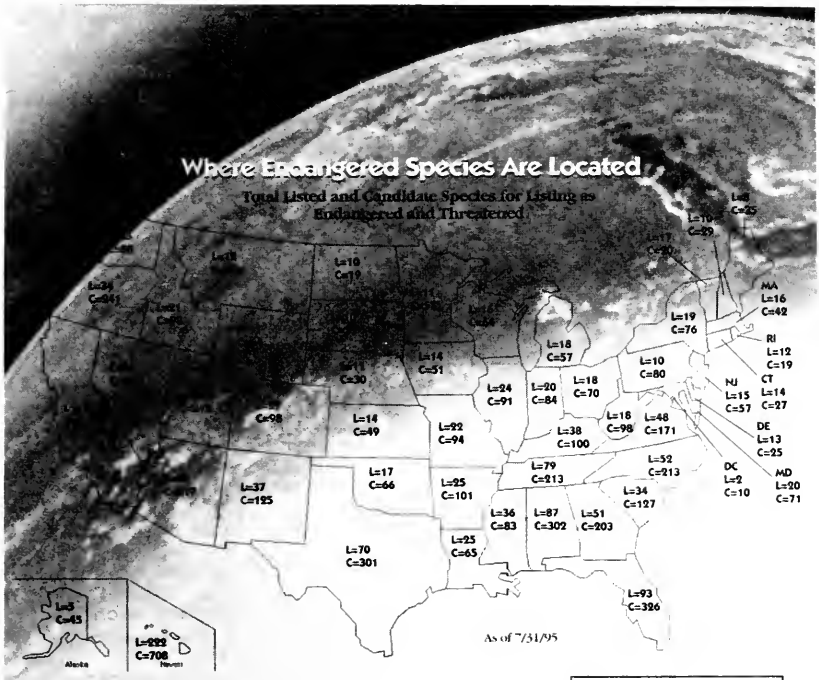
EXPLANATORY NOTES

1. Section 7 is triggered even by relatively moderate federal involvement in a project, such as use of a Corps of Engineers Nationwide Permit or HUD funding subsidies.
2. FWS regulations regarding "non-major" projects are unclear as to the exact procedure to follow, but by practice the Action Agency will usually proceed towards making the "may affect" determination outlined in the chart.
3. It may be possible to design the project in cooperation with the Action Agency so as to reduce the likelihood of an adverse finding, but intrusive measures such as setbacks and restricted building seasons may be required.
4. Revisions can include intrusive measures designed to eliminate project impacts by setbacks, elimination or movement of structures, restricted building seasons, etc.
5. The additional information FWS might request could include species surveys which could take several years to complete due to migratory behaviors and other survey constraints.
6. The 90-day period can be extended by up to 60 additional days without your concurrence.
7. Historically, about 6 percent of all formal consultations result in a "jeopardy opinion."
8. This finding is rarely made.

Sources:
The procedures for consultation are described in detail in the ESA, 16 U.S.C.§ 1536(b)-(p), and the Fish and Wildlife Service regulations, 50 CFR Part 402. Another helpful source of practical guidance is FWS's informal Draft Endangered Species Consultation Handbook/ Procedures for Conducting Section 7 Consultations and Conferences.




SECTION 7(a)(2) PROJECT CONSULTATION
Is proposed federal action (funding or approval) a major construction activity (usually whenever an EIS is required under NEPA)
YES
NO
AA proposes list of plant and animal species proposed for or already listed for protection under the ESA and which are in the project area, or requests that FWS supply such a list
2 OPTIONS
2
Does AA conclude listed species or habitat are potentially in project area?
YES
Hire biological consultants to assist in evaluating and minimizing project impacts
Does AA conclude project "may affect" ESA listed species?
3
YES
NO
NO
Within 180 days of receiving species list AA and applicant must prepare Biological Assessment to assess impacts of project
Does AA conclude project is NOT likely to adversely affect listed species?
NO
YES
Does FWS concur?
3
YES
NO
HAVE A NICE DAY
6
90days
AA and FWS conclude formal consultation
45 days
FWS delivers written Biological Opinion
3
FWS concludes take of ESA listed species will occur?
3
NO
YES
7
YES
FWS concludes project will jeopardize species of concern or adversely modify their designated critical habitat?
NO
Implement project according to Incidental Take Statement, if applicable
FWS prepares Incidental Take Statement approving take and requiring mitigation (known as "terms and conditions" and "reasonable and prudent measures")
4
15



Source: The U.S. Fish and Wildlife Service Prepared by:
The National Endangered Species Act Reform Coalition

KEY

L= Number of species listed under the ESA as Endangered or Threatened

C= The approximate number of species that are candidates to be added to the list of endangered or Threatened species under ESA. The actual number may be higher

Nationwide Totals

Listed Species = 970/975

Candidate Species = 4100/4200

NAHB

The National Association of Home Builders (NAHB),
the voice of America's housing industry.
Visit us on the World Wide Web at http://www.nahb.com

TESTIMONY OF ERIC R. GLITZENSTEIN
ON BEHALF OF THE FUND FOR ANIMALS, DEFENDERS
OF WILDLIFE, AND THE BIODIVERSITY LEGAL FOUNDATION

BEFORE THE COMMITTEE ON RESOURCES OF THE
U.S. HOUSE OF REPRESENTATIVES

(June 25, 1996)

I thank the Committee for this opportunity to testify regarding the implementation of the listing provisions of the Endangered Species Act. In particular, as lead counsel for plaintiffs in Fund for Animals et al. v. Lujan, Civ. No. 92-800 (D.D.C.) -- which resulted in a settlement agreement with the Bush Administration to expedite listing decisions for more than 400 animal and plant species -- I have been asked to address (1) why this lawsuit was filed in the first instance and what the settlement required of the government; and (2) how the recent moratorium on ESA listings, and the recent resumption of such listings, will affect the settlement. I will discuss each of those points in turn, and then offer some general recommendations, based on our experience with the settlement, regarding the process for listing endangered and threatened species.

WHY THE LAWSUIT WAS BROUGHT AND WHAT THE SETTLEMENT ACCOMPLISHED

One of the principal problems plaguing implementation of the ESA since its enactment has been the large backlog of "candidate" species awaiting a final determination by the Fish and Wildlife Service ("FWS") as to whether such species must be listed as

endangered or threatened.[1] Prompt decisions on the legal status of "candidates" -- i.e., species which FWS biologists have recognized as potentially warranting protection under the ESA -- is essential to furthering the purposes of the Act, and is also of benefit to all persons whose interests may be affected by such decisions.

On the one hand, if a candidate species does indeed warrant listing because it is biologically endangered or threatened, then prompt protection under the Act before it has reached a critical, "emergency room" condition affords federal and state decision-makers much more regulatory flexibility in accomplishing the conservation and recovery of the species. Conversely if (as has often been the case) a "candidate" species is allowed to deteriorate to the point where it is on the brink of extinction before it is listed, then the options for conserving that species will be severely limited (if they exist at all). At that point, the potential for land use and resource conflicts is much higher than if concerted efforts had been made to conserve the species at an earlier stage.[2]

---

[1] The National Marine Fisheries Service, which has ESA jurisdiction over marine species, has traditionally had a much smaller backlog of species awaiting listing determinations.

[2] According to a comprehensive analysis of the endangered species list performed by the Environmental Defense Fund in 1992, "most species, subspecies, and populations protected under the Endangered Species Act are not receiving that protection until their total population size and number of populations are critically low." Wilcove, Mcmillan, Winston, What Exactly Is an Endangered Species? An Analysis of the U.S. Endangered Species List: 1985-1991, 7 Cons. Bio. 91-92 (March 1993). EDF's analysis further found that "protection under the Endangered Species Act

On the other h- d, if the FWS ultimately concludes that a candidate animal or plant does not warrant listing under the Act -- e.g., because it is more plentiful than previously suspected, or because it does not actually qualify as a "species" -- then it is equally obvious why prompt decisionmaking is of benefit to all concerned. Simply put, the rapid resolution of the status of candidates means a shorter time frame in which all interested parties must be left in a state of regulatory limbo, uncertain as to whether the federal government will indeed list the species. Unfortunately, for much of the history of the ESA, candidate species -- and hence those state governments, private organizations, and individuals with an interest in them -- have been left in this regulatory netherworld for unconscionable periods of time.

During the Bush Administration, the Interior Department's Inspector General, in a September 1990 audit report, concluded that "[t]imely progress has not been made toward officially listing and protecting endangered and threatened plant and animal species." According to that report, there were approximately 600 domestic species which FWS biologists had classified as "Category 1" species -- those species for which Service biologists believed that they already had adequate information to proceed with listing, but which had not yet been the subject of formal listing

---

is coming much too late for most species," id. at 92, and that earlier listing might provide federal agencies "with more options for protecting vanishing plants and animals at less social or economic cost"). Id. at 93.

proposals. Of such species awaiting listing decisions, over 200 were considered by the FWS to be facing both an "imminent" and "high" threat of extinction.

The DOI Inspector General also predicted that, at the rate of listing then in effect, it would have taken the FWS between 38 and 48 years for the agency to make listing decisions on just those species which FWS biologists, at that time, suspected as being biologically endangered or threatened with extinction -- i.e., without even taking into account any additional species that the FWS might thereafter determine required listing. The Inspector General further found that dozens of species had already become extinct before they could even be listed, and that the FWS's ongoing delay in making listing decisions was "likely [to] result in additional extinction of certain plants and animals" in the future.

Compounding the problems identified by the Inspector General's report, in January 1992, President Bush issued a moratorium on the promulgation of proposed or final regulations. As a result of that moratorium, the listing of endangered and threatened species essentially ground to a halt for four months. Eventually, the Administration concluded that its regulatory moratorium did not, and could not legally, apply to the listing of endangered and threatened species, but the rate of listing decisions continued to proceed at a snail's pace, thus exacerbating the very problems decried by the Interior Department's own Inspector General.

It was against this backdrop that The Fund for Animals, Defenders of Wildlife, the Biodiversity Legal Foundation, and grassroots conservationists from around the country, filed their Complaint in federal district court in Washington in May 1992. Shortly after the lawsuit was filed, the parties began intensive settlement negotiations, and an agreement was reached in December 1992.

The heart of the agreement was a commitment by the FWS to, by September 1996, propose for listing -- or make final, judicially-reviewable decisions not to list -- all of the "Category 1" species existing at the time the parties entered into the agreement. The parties prepared as one of the Exhibits to the settlement (known in the settlement parlance as "Exhibit A") a list of all of the species which FWS biologists agreed were Category 1 species -- approximately 443 animal and plant species in all.

The Service's obligation to make decisions on all of the Category 1 species in four years was not pulled out of thin air. In testimony delivered to the Senate Subcommittee on Environmental Protection, the Bush Administration's FWS Director, John Turner, had committed that the Category 1 list of species would be "completely worked" by no later than 1996. The parties essentially took the Bush Administration's own commitment to Congress and embodied it in a formal, legally binding agreement.

While the FWS agreed to an overall deadline by when it would resolve its backlog of candidate species, the parties did <u>not</u>,

within that general time frame, set forth any schedule for the agency to make decisions on specific species. Instead, the parties contemplated that the FWS would be free to continue to apply its longstanding listing priority guidance, under which it is supposed to prioritize listing decisions based on the degree and magnitude of the threats facing the particular species. See 48 Fed. Reg. 43098 (1983). The parties also agreed on a detailed "substitution" scheme, under which the FWS could replace Exhibit A species with new candidates of higher priority, so long as the agency was making adequate progress in proposing a total number of species for endangered or threatened status.

The settlement accomplished other reforms in the listing system as well.[3] For example, the FWS made an explicit commitment to pursue a "multi-species, ecosystem approach" to its listing responsibilities. Thus, the agreement embodied the Interior Department's recognition that an ecosystem-based approach to listing "will assist [federal officials] in better analyzing the common nature and magnitude of threats facing ecosystems, help them in understanding the relationships among imperilled species in ecosystems, and be more cost-effective than a species-by-species approach to listing responsibilities."

When the settlement was signed and filed, it was applauded both by the conservation community and the Bush Administration. In particular, the Interior Department issued a news release

---

[3] A more complete description of all of the reforms accomplished by the Settlement is set forth in an article submitted as Attachment 1 to this testimony.

(Attachment 2), in which it explained that the settlement's emphasis on an ecosystem-based approach to listing would be "more cost-effective," and would allow the Service to "focus on the needs of plant and animal communities as a whole, not individually." The Service also stressed that the "agreement supports the Service's existing priority system which ranks at-risk, candidate species based on the degree of threat faced by each candidate," and FWS Director Turner praised the agreement as "essentially giv[ing] a seal of approval to the Service's existing method for setting priorities for these species in need of protection."

IMPLEMENTATION OF THE SETTLEMENT AND THE EFFECT OF THE MORATORIUM

For the first several years following filing of the settlement, plaintiffs received annual reports (as required by the agreement) stating that the FWS was complying, and fully intended to continue to comply, with the obligations imposed by the agreement. For example, in February 1995 -- just several months before the Congressional moratorium on listing was imposed in April of that year -- plaintiffs received a report from FWS Deputy Director Richard Smith which stated that "we currently expect to meet all of the obligations of this settlement agreement in the allotted time frames." The Service further reported that the Settlement had assisted it in taking a more efficient, ecosystem-based approach to its listing responsibilities, while still allowing it to prioritize listing decisions according to biological needs.

A little more than one year later, the situation has completely deteriorated. Although less than 100 candidate species now remain for resolution under the agreement, the Service has made it clear that it will not meet the September 1996 deadline. Moreover, it has offered plaintiffs no proposal for even modifying the schedule so that the status of the remaining candidates subject to the agreement -- which have been in regulatory limbo now for many years -- can finally be determined according to a date certain.

There are several reasons why the Agreement -- once touted as a major breakthrough in implementation of the ESA -- has now completely broken down. Some of these reasons are obvious, others are less so.

The Congressional Moratorium on Listing

As everyone knows, the Congressional moratorium on final listing decisions, and the subsequent battles over the Interior Department's Fiscal Year 1996 budget, decimated the Service's entire listing program. As described by the Service itself in March 1996 -- shortly before the budget situation was finally resolved and funding was restored -- "the net effect of these legislative and administrative actions is that the Service's listing program has been essentially shut down." 48 Fed. Reg. 9651.

The Congressional demolition of the listing program was one of the most shortsighted, mean-spirited, and counterproductive legislative actions in recent years. It

accomplished absolutely nothing -- even from the standpoint of those who believe (wrongly) that endangered species conservation has stymied economic development. As suggested above, by simply delaying decisions on species protection, the moratorium merely ensured that species eventually in need of listing would be in even worse shape -- and hence require even greater regulatory attention -- than if protection had been afforded at an earlier juncture.

The Administration's Own Political Interference With the Listing Program

At the same time, the entire breakdown in the listing process cannot be laid at the door step of Congress. For several reasons, the Administration's wounds are, to a considerable degree, self-inflicted. To begin with, while it deserves credit for ultimately insisting on the termination of the moratorium (after sufficient public pressure had been generated by conservation groups), the Administration failed to take a high-profile stand against the moratorium at earlier legislative stages when it could have been removed or avoided altogether.

Moreover, the Administration itself has greatly politicized the listing process -- by allowing political considerations to dominate individual listing decisions, by ignoring the scientific conclusions of its own field biologists, and by adopting general policies which are plainly reflective of political rather than biological imperatives. Sadly, rather than deflect Congressional criticism of the ESA -- as some Administration officials evidently anticipated -- these actions have merely served to

reinforce the perception that federal protection of an imperilled species is a horrible evil to be avoided at all costs.

As anyone who closely monitors the ESA listing process can attest, examples of listing decisions which are flagrantly motivated by political factors abound. Some of the most egregious cases include:

-- **the Alabama sturgeon**: In June 1993, the Service proposed to list this species as endangered, since it may be the rarest unprotected native fish species in the United States. However, in December 1994 -- under enormous pressure from Alabama's Congressional delegation -- the Service withdrew the listing proposal on the grounds that the species was suddenly suspected of having already become "extinct" (despite the fact that no scientific expert had supported that conclusion and even though a live member of the species had been caught just a year earlier).

When the listing proposal for the species was withdrawn, FWS Director Beattie stated in a press release that "if Alabama sturgeon are found, the Endangered Species Act provides the Service the flexibility to list them on an emergency basis." However, although still another member of the species was caught in April 1995 on the Alabama River, the Service has still refused to protect this desperately endangered species under the Act.

-- **the Canada Lynx**: Because this species has been eliminated from much of its range in the United States, and continues to face threats from habitat destruction and fragmentation, as well as trapping, in October 1994, FWS biologists prepared a draft proposed rule listing the species. Yet the proposed rule was never even published for public comment because the Service's Washington office overruled the agency's own field biologists and directed that the species not be protected.

To make matters worse, the rationale proffered for overriding the conclusions of the biologists -- that Lynx are plentiful in Canada, although they are facing grave threats in the U.S. portion of their range -- could be used to strip grizzly bears, gray wolves, and other high-profile species of the protections of the Act.

-- **the Queen Charlotte Goshawk and the Alexander Archipelago Wolf**: FWS biologists also concluded that these subspecies, which exist only in the Tongass National Forest in Alaska,

> should be protected under the ESA because of logging, road building, and other threats to their survival. Documents recently obtained from the Service reveal that these recommendations were ignored because of blatantly political considerations.
>
> For example, attached to this testimony is an extraordinary "briefing" document which lists the "pros" and "cons" of not listing the wolf (Attachment 3). One of the "cons" is that failing to protect the species is "[n]ot consistent with our analysis of the 5 factors in the listing regulations" -- i.e., that listing would be required by the law. On the "pro" side of the balance is that refusing to protect the species would be "least controversial with agencies, industry, and the Alaskan delegation to Congress."
>
> Predictably, as has now become commonplace, the "least controversial," politically correct decision is the one that took precedence over the legally and biologically correct one.

In addition to these and many more examples of politically-based listing decisions, the Service has issued broad "policy" pronouncements that also set back the cause of endangered species conservation and appear to be motivated purely by political considerations. For instance, in July 1995, the Service literally removed nearly 4,000 species from status as "candidates" by simply wiping out what was known as "Category 2" of its candidate list.

For more than fifteen years, this category had been employed by Service biologists to monitor the status of species that might eventually warrant listing, but for which more information-gathering was necessary. In other words, as the FWS recognized in its own published "notices of review," these were precisely the kinds of species as to which early warning signs of trouble might help avert the need for listing -- and hence invocation of full federal jurisdiction -- down the road.

The Service has never offered any biological justification for its abrupt elimination of Category 2. Rather, the agency conceded that it was merely responding to the misconception held by some members of the public that the thousands of category 2 species would invariably make their way onto the endangered species list within the next several years. Yet, instead of figuring out how to correct that misimpression while still carrying out the vital functions performed by the maintenance of "category 2," the FWS instead opted simply to sweep literally thousands of candidate species under the bureaucratic rug.

Similarly, in February 1996, the Service issued a new policy adopting a far more restrictive definition of "distinct population segment[s]" that may be listed under the Act. 61 Fed. Reg. 4722. The policy provides that "international boundaries" -- e.g., between Canada and the United States -- ordinarily will not be employed to determine what is a "distinct population segment" for purposes of invoking the Act's safeguards. As long-time FWS biologists have pointed out, however, if this policy (which has already been invoked to deny protection to the U.S. populations of the Lynx, Wolverine, and other species which are disappearing in the U.S.) had been adopted following ESA enactment, the FWS might never have listed the contiguous U.S. populations of the grizzly bear, gray wolf, woodland caribou, bald eagle, and brown pelican. In short, in the form of this little-noticed policy, the Service has set the stage for a drastic curtailment in the coverage of the Act.

The May 16 Guidance on Listing Priorities

Most recently, on May 16, 1996, the FWS announced its "guidance" on how it intends to spend the $ 4 million finally made available to it by Congress for listing actions during the remainder of Fiscal Year 1996. See 61 Fed. Reg. 24725. This "guidance" declares that the Service's 1983 priority guidelines -- which, as noted above, compel the agency to prioritize decisions according to the level of threats confronting species -- are no longer "sufficient" because of the "present backlog of proposed species" caused by the moratorium.

Accordingly, the guidance, in effect, indefinitely substitutes a new set of priorities for the purely biologically based one which has existed for thirteen years and is widely regarded as one of the crucial cornerstones of the Act. In essence, the guidance provides that, other than any emergency listings[4], the agency will spend all of its appropriated funds making final decisions on the 243 species for which the agency issued proposed rules but could not take final action while the moratorium was in effect.

Hence, under this guidance, the Service will spend no time and resources -- zero -- through the remainder of Fiscal Year

---

[4] While the Service stated that it would make emergency listings its highest priority, it has yet to match that promise with concrete action. To date, the Service has refused requests to emergency list species which are in desperate need of that protection, including the Alabama sturgeon -- whose plight I have already described -- and the Mountain yellow-legged frog. Only a handful of Mountain yellow-legged frogs still exist, and the FWS's own biologists have, to no avail, implored the agency to protect it as rapidly as possible.

1996 on any listing activity other than finalization of proposed rules: it will not move forward on publishing a proposed rule for a single additional candidate subject to the multi-species settlement, or for that matter, any other candidate; it will not even respond substantively to citizen petitions for the listing of any new species (except, perhaps, for those seeking emergency listing); and it will not devote any time and resources to the designation of critical habitat.

The Service makes no bones about the fact that this new "guidance" -- which essentially constitutes a self-imposed "moratorium" on most actions required by section 4 of the ESA -- represents a blatant departure from the agency's past emphasis on biological priorities in the expenditure of listing resources. Indeed, the Service flatly admits that, "even for [candidate] species facing imminent, high-magnitude threats," such species will be relegated to the back burner until the Service can plow through the 243 species awaiting final listing decisions -- even if those species face much lower threats and would not be measurably harmed by a brief delay in final listing.

The Service's asserted rationale for this draconian policy is that, since "final listings provide substantive protection, the Service is of the strong belief that this activity should take precedence over new proposed listings," petition findings, and other listing-related activities required by section 4 of the ESA which will provide only "limited conservation benefits." 61 Fed. Reg. 24727. That assertion has a superficial ring of

plausibility but, on closer inspection, it makes no sense.

As a practical matter, it is our understanding that there are regions -- including the New England region -- in which there are few, if any, proposals awaiting final rulemaking. Yet, under the FWS's policy, biologists in those regions are nevertheless prohibited from working on other listing activities so long as other regional offices are still clearing off the backlog of 243 species subject to proposals. This means that the guidance will have a disproportionate effect on states like California, where many of the species subject to present proposals exist.[5]

Thus, whatever the theoretical merits of the Service's emphasis on finalizing proposed listings, there is no sound basis for applying it to regions which do not have large backlogs of proposals. Accordingly, we respectfully suggest that the Administration be asked whether this is indeed the case and, if so, why FWS biologists in New England should do nothing to implement section 4 of the ESA, while their counterparts in California work feverishly on pending proposals.

Moreover, there is no legal or rational basis to the Service's policy pronouncement that issuing final listing rules should invariably -- i.e., regardless of biological needs -- be placed on a higher priority tier than the development of proposed

---

[5] This concentration of proposed species in California is largely due to a separate settlement of a case brought by the California Native Plant Society. That settlement set deadlines for listing activities on a large number of California plant species. See California Native Plant Society v. Lujan, No. 91-0038 (E.D. Ca.) (Settlement Agreement Approved August 22, 1991).

rules for candidates species or responses to new petitions. Obviously, if a particular candidate or petitioned species faces a far graver threat of extinction than a species already subject to a proposal, it is far more important that the candidate at least begin the process leading to ESA protection. In addition, a proposed rule at least brings the species some consideration in the section 7 consultation process.

Yet, under the Service's policy, even where all FWS biologists agree that a particular candidate, or a species subject to a new petition, should take precedence under the agency's longstanding priority scheme, the biologists are foreclosed from spending any time or effort on that species until every single one of the 243 proposals is subject to a final rule. Especially with regard to species that have been languishing in candidate status for many years -- such as the nearly 100 species still subject to the 1992 settlement agreement -- this policy makes no sense whatsoever and subverts the Service's purported commitment to a listing process based on biological priorities.

Indeed, as demonstrated by Attachment 4, many of the remaining settlement species are considered by FWS biologists to be extremely high priorities for listing -- because of imminent and serious threats to their continued existence -- yet under the May 16 policy guidance, no effort will be made to protect any of them for the foreseeable future. Such species include the Mariana Fruit Bat, of which only a maximum of 200 individuals remain; the Northern Idaho Ground Squirrel, whose population is

estimated at 600-800 individuals and declining; and the Riparian Brush Rabbit, which has a single population of as few as 170 individuals in Caswell Memorial Park in California yet is presently being hunted. The Service has no legitimate justification for not spending at least some of its FY 1996 appropriation on these and other desperately imperilled candidate species, whose numbers may already be lower than the minimum considered necessary by biologists to sustain a species in the wild.[6]

In addition, this self-imposed moratorium undermines the settlement agreement's emphasis on a multi-species, ecosystem approach to listing activities. Indeed, even if a FWS biologist working on a final rule encounters several candidates which are in the same ecosystem, and face exactly the same threats to their survival, he or she must ignore the plight of the similarly situated candidates and instead revert to the single species approach to listing that the Service previously denounced.

In short, the net effect of the moratorium, and the Service's unfortunate reaction to it, is a retreat to the intolerable state of affairs which existed prior to the settlement agreement -- a situation in which the number of candidates awaiting listing decisions multiplies exponentially; imperilled species remain candidates for years or decades and are close to extinction by the time they receive federal protection;

---

[6] Attachment 4 was compiled from Listing Priority Forms prepared by FWS biologists.

the Service backs away from its commitment to an ecosystem-based approach to listing; and interested parties are left in regulatory limbo while they await word from the federal government as to whether it will move forward with a listing proposal.

WHAT SHOULD CONGRESS DO NOW

If Congress wants a listing process that is efficient, apolitical, and biologically sound, it must do the following:

1. Particularly to compensate for the devastating effects of the moratorium, Congress must provide the FWS with the resources that it needs to both efficiently list species and accomplish the other monumental tasks imposed on it by the Act.

2. Congress should codify the Service's obligation to take an ecosystem, multi-species approach to its listing responsibilities. This would not only make the process far more efficient, but would have the added benefit of focusing public attention on threats faced by entire ecosystems, rather than on the individual species versus development controversies that have often afflicted ESA implementation in the past.

3. Congress should adopt an amendment to the ESA which requires the Service to propose a listing rule -- or formally decide not to list a candidate species -- within a specified, reasonable period of time. Only that approach -- which the settlement sought to implement -- would ensure that future candidate species do not languish unprotected indefinitely, and would provide interested parties with some sense of certainty as

to when the Service will at least make decisions.

Equally important is what Congress and the Administration should not do:

1. They should not continue to play political football with the listing process while species continue to spiral towards extinction. Indeed, perhaps the most useful thing that both Congress and the Administration could do is simply leave FWS biologists alone to do their jobs in a professional and responsible fashion. The overwhelming majority of these biologists are dedicated, capable public servants whose morale has been needlessly ravaged during the past year.

2. They should not add even more costs and procedural hurdles to what is already a lengthy, procedurally cumbersome listing process. For example, pending legislative proposals to mandate scientific "peer review" of all listing decisions are utterly unjustified by any empirical evidence; not a single decision to list a species has ever been overturned by a Court on grounds that it was not supported by scientific evidence. Such an across-the-board requirement for "peer review," or any other new procedural hurdle in the listing process, could merely add further unnecessary delay, thus ensuring that species are in even worse shape once they are listed.

As suggested above, instead of making the listing process more complex and costly, all efforts should be devoted to making it more streamlined and efficient. As the National Academy of Scientists' expert panel concluded in its recent,

Congressionally-authorized report, Science and the Endangered Species Act, we are presently in the midst of a "major episode of biological extinction," and the "present cause of extinction is a single biological species that has become so successful and so exploitative that it threatens to destroy the very capital that is necessary for its own long-term survival."

In the face of this extinction crisis, the last thing that Congress should contemplate doing is making the federal protection of endangered and threatened species an even more arduous, difficult, and costly process than it has already become.

Eric R. Glitzenstein

Meyer & Glitzenstein
Suite 450
1601 Connecticut Ave., N.W.
Washington, D.C. 20016
(202) 5885206

On the USFWS Settlement Regarding Federal Listing of Endangered Species

by

Eric R. Glitzenstein

One of the principal problems plaguing implementation of the Endangered Species Act (ESA) since its creation has been the enormous backlog of "candidate" species awaiting formal listing as endangered or threatened. In an effort to expedite the listing of such species, a number of national wildlife groups and grassroots environmentalists from around the country—led by The Fund for Animals and Jasper Carlton, Director of the Biodiversity Legal Foundation—filed a sweeping lawsuit in 1992 against then Secretary of the Interior Manuel Lujan and U.S. Fish and Wildlife Service (USFWS, or the Service) Director John Turner (*The Fund for Animals, et al. v. Turner*, Civ. No. 92-800). On December 15, 1992, the parties to the lawsuit reached a comprehensive settlement in the case, which, if implemented, will greatly speed up the listing process for hundreds, and possibly thousands, of imperilled species.

Schedule For Listing Candidate 1 Species

The heart of the agreement is a commitment by USFWS to, by September 1996, propose for listing—or make final, judicially-reviewable decisions not to list—401 domestic "Candidate 1" species of plants and animals. Candidate 1 species are those for which the Service believes it already has adequate information to list the species as endangered or threatened, but for which it has not yet issued formal Federal Register notices to that effect.

Under the agreement, therefore, USFWS is required to issue approximately 100 listing proposals per year for the next four years. Since enactment of the ESA, USFWS has averaged less than forty listings per year and, in papers filed in the lawsuit prior to settlement, the Service acknowledged that, in recent years, its "goal" was to list only about "50 species per year on a nationwide basis." (Defendants' Answer to Complaint in *The Fund for Animals et al. v. Lujan*, at ¶ 60). Thus, the settlement agreement will result in a substantial increase in the pace of listings.

Reforms Involving "Warranted but Precluded" Species

Another significant aspect of the agreement involves the treatment of species whose listing has been deemed by USFWS to be "warranted but precluded" in response to citizen petitions. Under the ESA, when an individual or organization formally petitions USFWS to add an animal or plant to the list of endangered or threatened species, the Service must, within 90 days, "make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." Within one year of receiving a petition which USFWS has determined may be warranted, the Service must make one of three findings: (1) that the petitioned action is not warranted; (2) that the petitioned action is warranted, in which case USFWS must promptly publish a proposal to list the species; or (3) that the petitioned action is warranted, but that the "immediate proposal and timely promulgation of a final regulation" listing the species is "precluded by pending" listing proposals, and that "expeditious progress" is being made to list other qualified species.

In *The Fund for Animals* lawsuit, the plaintiffs argued that the Service had placed hundreds of species in the "warranted but precluded" category for many years, although it could not demonstrate, as required by the ESA, that it was making "expeditious progress" in listing species as endangered or threatened. In addition, the plaintiffs were concerned that many of these species had not even been designated as Category 1 species, although the Service had purportedly concluded that their listing

For many, the bald eagle symbolizes American endangered species. Photo by New York Zoological Society.

is in fact "warranted." Rather, many of these species had been placed in "Category 2," a classification which is supposed to be reserved for species for which the Service lacks sufficient evidence to make a definitive finding of endangered or threatened status.

The most important practical effect of this anomaly in the Service's treatment of "warranted but precluded" species was that many of these species were not being assigned listing "priority" numbers in accordance with the Service's long-standing listing priority scheme (see 48 Fed Reg. 43098 (1983)). Under that priority system, all Category 1 species are assigned priority numbers, which are supposed to reflect the degree and magnitude of the threats jeopardizing the species. Category 2 species are not ordinarily assigned formal priority numbers by USFWS.

Thus, by making "warranted but precluded" findings for numerous species year after year, and by placing such species in Category 2 rather than Category 1, USFWS was effectively relegating such species to a form of regulatory limbo. From the standpoint of the persons or organizations who had petitioned for protection of these species, the Service's placement of the species in Category 2—and concomitant failure to assign a priority number—made it virtually impossible to even gauge where the species stood in the queue relative to other imperilled plants and animals lacking protection under the ESA.

To resolve plaintiffs' complaint of misuse of the "warranted but precluded" designation, USFWS agreed to a number of reforms. First, the settlement agreement provides that all species that had been classified as "warranted but precluded" as of September 1, 1992, and for which USFWS had completed status surveys within one year prior to that date—12 species in all—the Service will, by October 1993, either (1) propose such species for listing as endangered or threatened, (2) officially place such species in Category 1 and assign the species a listing priority number in accordance with the Service's published priority system; or (3) determine that listing is not warranted for the species and publish a Federal Register notice to that effect. With regard to all such animals and plants that are assigned a listing priority number of 1, 2, or 3—i.e., species or subspecies which, under the Service's priority system, are facing both an "imminent" and a "high" threat of extinction—the Service must, by September 1996, propose such species for listing as endangered or threatened, or publish a Federal Register notice explaining why listing of the species is not warranted.

Second, as to all species that were classified as "warranted but precluded" as of September 1, 1992, and for which USFWS did *not* complete a status survey within one year prior to that date—approximately 800 species of plants and animals—the Service must, by October 1993, make new findings "based on the best available scientific and commercial information." These findings must either (1) conclude that the petitioned action is warranted (to be followed promptly by published notices that propose such species for listing as endangered or threatened); (2) officially place any such species that the Service continues to classify as "warranted but precluded" in Category 1 and assign such species a listing priority number in accordance with the Service's listing priority system; or (3) conclude that the species should not be listed, a decision which must be explained in a published and judicially reviewable Federal Register notice. Once again, with regard to any such species to which USFWS assigns a priority number of 1, 2, or 3, the agency must, by September 1996, propose the species for listing as endangered or threatened, or make a final decision explaining why protection of the species under the ESA is not warranted.

Third, with regard to all species that are designated as "warranted but precluded" after September 1, 1992, USFWS has agreed to promptly assign each such species a listing priority number. This commitment is to be embodied in a published statement, which will inform all members of the public that, henceforth, all species classified as "warranted but precluded" in response to listing petitions will not be placed in Category 2 but, rather, will be assigned

Endangered Species UPDATE

A forum for information exchange on endangered species issues
March 1993 Vol 10 No. 5

Judy Tasse ..... Editor
Otto Gonzalez ..... Associate Editor
Terry Root ..... Faculty Advisor

Instructions for Authors
The *Endangered Species UPDATE* welcomes articles related to species protection in a wide range of areas including but not limited to research and management activities and policy analyses for endangered species, theoretical approaches to species conservation, and habitat protection. Book reviews, editorial comments, and announcements of current events and publications are also welcome.

Readers include a broad range of professionals in both scientific and policy fields. Articles should be written in an easily understandable style for a knowledgeable audience. For further information, contact the editor.

Subscription Information
The *Endangered Species UPDATE* is published approximately ten times per year by the School of Natural Resources and Environment at The University of Michigan. Annual rates are $23 for regular subscriptions, and $18 for students and senior citizens (add $5 for postage outside the US). Students please enclose advisor's signature on university letterhead. Send check or money order (payable to The University of Michigan) to

Endangered Species UPDATE
School of Natural Resources
and Environment
The University of Michigan
Ann Arbor, MI 48109-1115
(313) 763-3243

Cover: Northern bald eagle (*Haliaeetus leucocephalus*), our national symbol and an endangered species. Photo by New York Zoological Society.

The views expressed in the *Endangered Species UPDATE* are those of the authors and may not necessarily reflect those of the US Fish and Wildlife Service or The University of Michigan.

Production of this issue was made possible in part by support from the Chevron Corporation and the International Association of Fish and Wildlife Agencies.

Chevron

printed on recycled paper

a listing priority number and placed in Category 1. In essence, therefore, the Service has agreed to integrate its system for responding to listing petitions with its internal process for prioritizing candidate species.

Commitment To An Ecosystem Approach to Listing

The final noteworthy aspect of the settlement agreement is an explicit commitment by the federal government to pursue a "multi-species, ecosystem approach" to its listing responsibilities. According to the agreement, USFWS and the Department of the Interior now recognize that such an approach—which has long been urged by a number of conservationists—"will assist [federal officials] in better analyzing the common nature and magnitude of threats facing ecosystems, help them in understanding the relationships among imperilled species in ecosystems, and be more cost-effective than a species-by-species approach to listing responsibilities." Indeed, in recent years, the Service has undertaken such a multi-species approach to meet its obligations under two other settlement agreements that require it to list a large number of California and Hawaiian plant species (see *Conservation Council for Hawaii v. Lujan*, Civ. No. 89-953 (D. Hawaii) (Settlement Agreement Approved May 9, 1990); *California Native Plant Society v. Lujan*, No. 91-0038 (E.D. Ca.) (Settlement Agreement Approved August 22, 1991)). [For more on ecosystem approaches, see Endangered Species UPDATE Special Issue, Vol.10 Nos.3&4, "Exploring an Ecosystem Approach to Endangered Species Conservation"—Ed.]

Expressly endorsing this approach as a national policy, *The Fund for Animals* settlement provides that the Service will "direct each region, where biologically appropriate, to use a multi-species, ecosystem approach . . . [1] in the monitoring of candidate and warranted but precluded species, including status surveys, [2] in proposing species for listing as endangered and threatened; [3] in adopting final rules listing species as endangered and threatened; and [4] in designating critical habitat." Moreover, in a commitment that should greatly streamline the listing process if fully implemented, the agreement obligates the Service, in pursuing this multi-species approach, to "consider and rely on, to the maximum extent feasible, the commonality of threats faced by different species in the same ecosystem."

Simply stated, therefore, if USFWS determines that a large number of species within a given ecosystem are at risk because of the same problem—most obviously, habitat destruction—the Service must, under the settlement agreement, list all of those species together in a unified rulemaking proceeding, rather than repeatedly reinvent the wheel in case-by-case listing packages. Such an approach, of course, will promote not only speedier protection of imperilled species, but will also allow a federal agency that is notoriously underfunded to get the biggest bang out of its few listing bucks. It should also have the added benefit of focusing public and media attention on threats faced by entire ecosystems, rather than on the individual species versus development controversies that have often afflicted ESA implementation in the past.

Implications for Endangered Species Act Reauthorization

While the settlement accomplishes a number of much-needed reforms, it is by no means a cure-all for what ails the listing process. Truly long-term, systemic improvements in the process can only come from Congressional overhaul of the Act. To begin with, assuming that USFWS fulfills its obligation to list all *current* Candidate 1 species by September 1996, the settlement does not ensure that future Candidate 1 species do not languish unprotected indefinitely. An amendment to the ESA requiring the Service to propose a listing rule—or formally decide not to list a Candidate 1 species—within a specified period of time would help guarantee that USFWS does not revert to its prior lackadaisical pace.

Moreover, the settlement agreement does not directly obligate the Service to make any changes in its treatment of Candidate 2 species, other than those which have also been designated as "warranted but precluded" in response to citizen petitions. As suggested above, as a result of the agreement, any individual or organization convinced that a Category 2 species warrants listing is at least in a better position to ensure that the species is placed in Category 1 and receives a listing priority number. Otherwise, the settlement—and the ESA itself, as currently drafted—afford no assurance that the Service will, within a reasonable time frame, perform the biological status reviews and gather other information that may be necessary to initiate regulatory action for Candidate 2 species.

Finally, Congressional codification of certain features of the agreement would ensure that reforms agreed to by USFWS become a permanent fixture in ESA implementation. Most notably, Congress should set in legislative stone the Service's obligation to take an ecosystem, multi-species approach to its listing responsibilities, as well as the agency's commitment to, at a minimum, assign all "warranted but precluded" species to Category 1. Virtually all students of the Act agree that these are useful, if not vital, policy reforms, which can only assist in making the listing and petition process more efficient, sensible, and comprehensible to interested citizens and organizations.

Of course, the single most helpful thing that Congress could do is provide Interior Secretary Bruce Babbitt—the first Interior leader with a genuine commitment to the ESA in more than a decade—with the resources that he needs to *both* efficiently list species *and* accomplish the other herculean tasks imposed on him by the Act, such as drafting meaningful recovery plans and designating critical habitat. In the absence of such desperately-needed funds, the Act's lofty promise to "provide a program for the conservation of . . . endangered and threatened species" and their ecosystems will continue to ring hollow for many animals and plants in dire need of the Act's protection.

Eric R. Glitzenstein is a partner in the public-interest law firm Meyer & Glitzenstein, and was lead counsel for the plaintiffs in the case discussed in this article.

DEPARTMENT of the INTERIOR
news release

Fish and Wildlife Service

For Release: December 15, 1992 Georgia Parham 202-208-5634

AGREEMENT SETS TIMEFRAME FOR PROTECTING RARE PLANTS AND ANIMALS

The Interior Department's U.S. Fish and Wildlife Service today announced it has reached out of court settlement of a case involving the agency's procedures to reduce the backlog of plants and animals awaiting listing decisions under the Endangered Species Act. The settlement agreement was reached with The Fund for Animals, Defenders of Wildlife, In Defense of Endangered Species, and other individuals.

The agreement supports the Service's existing priority system which ranks at-risk, candidate species based on the degree of threat faced by each candidate, as well as the taxonomic rarity of a species.

"This agreement essentially gives a seal of approval to the Service's existing method for setting priorities for these species in need of protection," said John Turner, Service Director.

Under the agreement, and based on the existing priority system, the Service will decide whether to propose for listing approximately 400 "category 1" candidate plants and animals over the next four years. Category 1 species are those for which the best scientific information supports listing but, due to other demands, the Service has been unable to develop a listing proposal. Those species with the highest priority will be proposed first.

(more)

The Service has agreed to decide whether to propose for listing approximately 95 category 1 candidate species each year through September 1996, a commitment comparable with the past two years, when the Service proposed 215 plants and animals and listed 144. In addition, the Service is to report annually on its progress through 1997.

The agreement also formalizes a Service commitment to emphasize, where possible, multiple species listings or proposals that address entire ecosystems, instead of a species-by-species approach. In addition to being more cost-effective, these methods allow the Service to focus on the needs of plant and animal communities as a whole, not individually.

Species petitioned for listing, that are determined by the Service to be warranted for listing but precluded by species currently of higher priority, will be classified only as category 1 species, instead of category 1 or 2. Category 2 candidates are those for which insufficient information exists to conclude that listing is warranted but continued monitoring will be carried out.

-DOI-

ALTERNATIVES FOR LISTING DECISIONS - PROS AND CONS
ALEXANDER ARCHIPELAGO WOLF

ACTION	PROS	CONS
Not Warranted	Least controversial option with agencies, industry, and the Alaskan delegation to Congress.	Not consistent with our analysis of the 5 factors in the listing regulations.
	Gives the benefit of the doubt to the Forest Service that they will permanently and effectively change their management practices to protect wolves.	Opposed and possibly contested by some conservation groups.
	Will be opposed by petitioners and other environmental groups. ⟷	Allows continued habitat loss for wolf.
	Will be supported by congressional delegation. ⟷	May not obviate the need to list the wolf eventually.

Warranted	Consistent with our analysis of the 5 factors in the listing regulations.	Extremely controversial and potentially damaging to the ESA.
	Dave Person, A.A. wolf biologist, and Matt Kirchhoff, ADF&G wolf biologist, recognize the long-term problem with wolf survival and support the listing proposal.	Does not allow time for the Forest Service to administrate changes in their land management practices before proposed rule.
	Continues to pressure Forest Service to recognize the need to change its land management practices to protect wolves, and the Forest Service could administrate changes before a final rule.	
	Allows immediate legal protection of wolves and wolf habitat.	
	Will not be supported by congressional delegation. <⟷>	
	Will be supported by petitioners and other environmental groups. <⟷>	

Settlement Agreement Species
Appendix A

Species	Designation Present/Past	Priority No	Comments
Ione manzanita	C1/C1	2	Mining activities continue to destroy species habitat. Mining has eliminated several populations since 1990. Farming and grazing has destroyed or degraded species habitat. Clearing for development, both residential and industrial, threatens the habitat. Species grows on very unique soil which is unusual in U.S. Due to soil type, may be difficult to reestablish species on BLM land. Unidentified fungal pathogen has caused major die-back of partial or entire stands of species. Species not listed by state (CA). Under CA mining laws only protection received by species is at discretion of lead agency. **Species is restricted to 15 occurrences. Trend is declining.**
Purple amole	C1/C1	6	Primary threats include military activities, predation by cattle and rabbits, competition with alien grasses, and road grading activities. Military activities include tank operations and human activity. One population of only four in existence was severely damaged by a tank in 1994. Efforts to reduce military impacts have been, for all intents and purposes, unsuccessful. Biologist surveying plant attempted to flag off population to deter tank traffic but efforts were ignored. Species is eligible for state listing (CA), but has not been listed. Even if state listed, state law does not appear to protect plants from habitat modification or land use changes. Army directives for management of sensitive natural resources have not been sufficient to provide adequate protection to species. Species is vulnerable to extinction due to **low numbers of individuals and populations. Species is restricted to 4 populations all on the Fort Hunter-Liggett Army base. Population size estimates are approximately 1,000 per population. Species trend is unknown.**
Camatta Canyon amole	C1/C1	3	Primary threats include off-highway vehicle use, predation by cattle and rabbits, competition with alien grasses, and road grading activities. One population of species located on Los Padres National Forest. Until 1984, habitat for plant was used as staging area for OHV activity. Portion of habitat fenced in 1984 but fencing never completed. Recently seen OHV tracks indicates that damage still occurs. Cattle grazing occurs within habitat. Herbivores (i.e. cattle, rabbits, other small mammal) have been estimated to consume 75 percent of leaves and flowers of species. State (CA) listed as rare in 1978. State law, however, appears to exempt taking of plants via habitat modification or land use change by the landowner. Current regulations guiding management of sensitive resources on USFS lands have been insufficient to avoid damage to species. Limited number of populations and individuals increase threat of extinction from stochastic events. **One population of species occurs on the Los Padres National Forest. A 1982 survey estimated popoletion size at 1,000. No new survey has been done. Species trend is unknown.**
La Graciosa thistle	C1/C1	2	All populations of species are on private land. Primary threats include groundwater pumping, ORV use, and coastal development. Thistles are considered to be agricultural pests and at least one population is believed to have been extirpated through herbicide use. Only one of seven populations has substantial number of plants (fluctuating between 4,000 and 54,000) but habitat is threatened by proposed commercial abalone operation and port. 1995 winter storms eliminated occupied habitat. State (CA) listed as threatened. State laws, however, appear to be inadequate to protect against the taking of such plants via habitat modification or land use change by landowner. CEQA determinations made by state agencies have or will adversely affect the habitat of the species. Mitigation measures and relocation efforts have failed. State management plan for species, though only consisting of recommendations, has not been implemented. **There are only 7 populations of this species, five of these have less than 50 plants each. Species is vulnerable to stochastic extinction due to the low numbers of individuals and populations. Species trend is declining.**
Cirsium rhothophilum	C1/C1	2	Species is highly specialized plant restricted to an extremely limited habitat consisting of strip of land between wind blown beach and stabilized dunes. Strip of habitat is only a few meters wide for majority of distribution. 80 percent of plants occur on Vandenburg Air Force Base. Primary threats to populations on and off Air Force Base include oil production activities, trampling by beach users, ORV use, and development of Coast Guard facility. State (CA) listed as threatened. State law, however, inadequate to protect against the taking of such plants via habitat modification or land use changes. **No information is provide regarding number of population or individuals. Species trend is in decline.**
Baker's larkspur	C1/C1	2 (prev. 5)	Past sheep grazing extirpated species in Sonoma County. Current threats to species include over collection and road maintenance activities. Only population of species is located on a steep road bank along a county right-of-way. State and federal regulatory mechanisms are inadequate. CEQA is inadequate. Low number of individuals in population threatens the species with extirpation. **Only one population with about 35 individuals is known to exist. Species trend is declining.**

Attachment 4

Settlement Agreement Species
Appendix A

Species	Designation Present/Past	Priority No	Comments
Eragrostis fosbergii	C1/C2	2	Primary threats include adverse habitat modification by pigs and goats; predation by goats, trampling, overcollection, competition with alien plants. State (HI) does not recognize species as endangered until listed by federal government. Stochastic extinction major threat. **Only four populations containing 6 individuals are known to exist. Species trend is unknown.**
Willamette Valley daisy	C1/C1	3	Species believed to be extinct until 1980. Primary threats include urbanization and intensive agricultural practices; herbicide spraying for roadside sites; development for private land sites; dumping of fill material; road construction; and livestock grazing and farming practices. One population (approx. 6,000 individuals) was plowed in 1986. Another population and a part of a third population was destroyed by road grading in 1993. No existing regulatory mechanisms protect this species. **Species is known to exist in 18 sites with a combined population of 7,474 plants. Species trend is declining.**
Ione buckwheat	C1/C1	3	Primary threats include clay mining, clearing for farming, and grazing, clearing for residential and commercial development. Habitat fragmentation associated with mining and road building also threatens species. State (CA) listed as endangered, but CEQA process inadequate for protection. **Species is known from 9 populations. Species trend is not indicated.**
Irish Hill buckwheat	C1/C1	3	Threats are same as for Ione buckwheat. **Species is known from only two populations. Species trend is not indicated.**
Tutuila tree snail	C1/None	2	Primary threats include habitat loss to agriculture and urbanization and, most importantly, competition with alien snail. Alien snail species is capable of completely extirpating prey, including species in question. Hurricanes can also damage. Species occurs in American Samoa. **Fewer than 2,000 individuals are known to be alive. Species trend is declining.**
Species listed in Appendix A of settlement as priority 5 yet listing priority form, dated 1/19/94, indicates that species had no prior designation.			
Gentner's mission-bells	C1/C1	2	Primary threats include housing development, woody plant species invasion associated with fire suppression, and collection. Largest known population destroyed in 1990 by construction of driveway. 3 of 6 flagged populations partially destroyed by clearing and bulldozing between 1986 and 1988. Species attractive to collectors for horticultural purposes. Not protected by State (OR) but proposed for listing in 11/94. Species threatened by stochastic events. Species rarely produces seed. **Species is known from 19 sites encompassing 16 acres and containing 165 plants. Species trend is declining.**
High Rock Springs tui chub	C1/C1	3	Entire population of subspecies is on privately owned ranch and, therefore, extremely vulnerable to destruction, modification, or curtailment of habitat. African tilapia escaped from aquaculture pond on ranch and channel catfish introduced into system resulted in competition with and predation on the species evidently leading to its extirpation in 1989. Subspecies enjoys no regulatory protection. Species is considered extinct but will remain a candidate until survey confirms species is gone.
Cowhead Lake tui chub	C1/C1	3	Primary threats include diversion of water especially during periods of drought, livestock grazing, predation by snakes and birds, pest control programs, and intentional vandalism by private landowners. Prolonged drought in early 1990s resulted in the desiccation of much of species habitat. Livestock grazing has removed most of riparian vegetation reducing cover for species and making them more vulnerable to predation by snakes and birds. Species is confined to 4 km of slough behind Cowhead lake. No State (CA) regulatory mechanisms exist to protect the species. **Species is known from one site containing, based on a 1993 survey, a minimum of six chub, including juveniles. Species trend is declining.**
Gaviota tarplant	C1/C1	3	Land on which species is found is either owned or leased by Texaco or Chevron. 40 percent of habitat within known range of species has been destroyed, altered, or fragmented by construction of oil and gas facilities and pipelines. Future projects will likely adversely affect species and increase likelihood of extinction. Heavy grazing of species may also affect survival by reducing stature and seed production. Stochastic events including fire and oil spills threaten this species with extinction. **Species is known from 20 colonies encompassing 60 acres of habitat. Number of individuals in each colony fluctuates drastically depending on a number of variables. Species trend is declining.**
Hua kuahiwi	C1/C1	2	Primary threats include adverse habitat modifications caused by feral pigs, cattle, and sheep; rat predation on bark, flower, and fruit; insect damage; and competition with alien plants. State (HI) does not recognize species as endangered until federal listing is completed. Species threatened with stochastic extinction and/or reduced reproductive vigor due to small numbers. **Only plant known of species died in 1930. Eleven plants cultivated from this parent replanted in original habitat. Number of plants surviving is unknown. Species trend is indicated as possibly extinct.**
Hau kuahiwi	C1/C1	2	Threats same as for species above. **Species known from one population consisting of 22 individuals. Species trend is indicated as possibly extinct.**

Settlement Agreement Species
Appendix A

Species	Designation Present/Past	Priority No.	Comments
Santa Cruz tarplant	C1/C1	2	Populations from San Francisco area have been extirpated Monterey County population also extirpated Last naturally occurring population in Bay Area destroyed in 1993 when habitat was converted into shopping center Of 13 remaining native populations, 8 are on privately owned lands currently or anticipated for development Watsonville airport population currently being mowed, disced, and grazed Proposed airport expansion will eliminate habitat Of remaining four habitats 200 individuals on property donated to CA Poly Univ , 3000 individuals on unlandscaped portion of golf course, one partially protected by conservation agreement, and last is on CA Dept of Parks land which may be open to ORV use State (CA) listed as endangered in 1979 Agricultural use and grazing permits invasion of alien plant taxa which out compete species **Species known from 20 sites, 13 native, 7 experimental seedings Number of individuals remaining, except for numbers provided above, are not listed. Species trend is declining.**
Hipomo lupine	C1/C1	2	Guadalupe Dunes, private land, contains all of the remaining members of this species Primary threats include highway realignment, ORV impacts, introduced weedy plants, continued energy related developments, commercial development, predation by pocket gophers and invertebrates, natural disaster, and facility catastrophe Guadalupe dunes has been extensively developed and altered for petroleum extraction Pocket gophers have been documented to consume whole colonies of species State (CA) listed as endangered though state law appears inadequate to protect such plants from habitat modification and land use changes **Species known from five occurrences with fewer than 700 individuals. Species trend is declining.**
Yreka phlox	C1/C1	2	Significant portion of species habitat in City of Yreka (CA) is threatened by future development for homes and infrastructure 60 acres of habitat (of approx 270) falls within subdivision Seven of eight parcels that support species have species on over 75 percent of lot Species is State listed as endangered CEQA may not be effective in addressing species protection needs on private lands Stochastic events and habitat fragmentation may threaten species Second population outside Yreka is undisturbed **Species is known from two sites. The number of surviving individuals is not known Species trend is declining.**
Rough popcornflower	C1/C1	2	Wetland habitat is at risk due to filling This threat is particularly pronounced on private lands Of nine sites, seven are currently being or are likely to be impacted by filling or cattle grazing At one site, suitable habitat has been cut in half by development At another, 80 percent of the plant numbers due to fill dirt dumping Highway maintenance activities by ODT threatened taxon near highway Cattle, sheep, and horse grazing resulted in direct loss of habitat at four sites Since 1983 the numbers of individuals at each of these sites has been halved due to spring grazing State (OR) listed as endangered but law only provides protection for species on lands managed by OR Dept of Transportation **Species is known from nine sites cocurring less than 1,400 individuals.**
Mariana fruit bat	C1/C1	3	Primary threats include development, natural disasters (typhoons), poaching, and predation by brown tree snake Populations on Saipan, Tinian and Agiguan islands have dropped from tens of thousands historically to 50 or fewer individuals on Saipan, 50 or fewer on Tinian, and 100 or fewer on Agiguan through hunting and habitat destruction by typhoons Hunting is now illegal but poaching is common Poaching is expected to increase with recent end of legal fruit bat imports from Palau Introduction of brown tree snake from Guam could decimate population Extinction due to stochastic events is a risk **Only a maximum of 200 individuals are believed to exist on three islands. Species trend is declining**
Kauai cave amphipod	C1/C1	1	Habitat of species completely on private lands in an area of active resort and housing development Threat from development is imminent and if conservation measures are not implemented, this species will be extirpated due to habitat loss Use of insecticides and biological control agents on golf course and residential areas pose serious threats to species Species was proposed to be listed as endangered and critical habitat was proposed in June 1978 as a result of petition submitted in 1977 In June 1980, the two year time limit on proposed rules expired for this species and the proposed rule was withdrawn **Species is known only from four lava tube and limestone caves on southeast coast of Kauai. No reliable method for estimating population size exists. Species trend is declining.**

Species	Designation Present/Past	Priority No.	Comments
Northern Idaho Ground Squirrel	C1/C2	3	Remaining habitat is extremely small and imminently threatened by agricultural land conversation, meadow invasion by conifers (caused by fire suppression), grazing by domestic livestock, golf course development, ORV use, and campground expansion. According to USDA (1994), remaining populations are likely to become extinct. One site for species converted into golf course. Plinking or recreational shooting may contribute to decline of species. Scientific collecting may adversely impact social structure of population. No formal protection currently available to population on USFS lands. Efforts to develop CA with USFS have failed. Largest known population is on private land and landowner has been unwilling to enter into CA. Stochastic events threaten population. **Species is known from one single large meadow complex with smaller populations distributed over 10 x 30 km area. Species, however, appears to actually occupy less than 500 hectares. Total number of species estimated at 500-600 in Idaho. Species trend is declining.**
Riparian brush rabbit	C1/C1	3	90 percent of original habitat destroyed. Riparian habitat modified or eliminated by urban, agricultural, and flood control activities. Remaining remnant habitat along streams provide little or no refugia for species, particularly during floods. When flooding occurs some individuals may drown while others are forced to high, more open land, which increases risk of predation. Habitat has also been cleared for housing, flood control activities, and farming. Future habitat losses are expected with a proposal to clear 63 miles of river vegetation for flood control purposes. Livestock grazing, ORV use, and construction of rifle ranges also destroy or degrade habitat. California permits hunting of brush rabbit from July 1 through January 30 with a daily bag of five animals. State regulations do not distinguish between the subspecies in question from other subspecies thus some individuals may be vulnerable to hunting. Rodenticides used for rodent control may also affect subspecies. Inbreeding depression is also a concern. Population is vulnerable to stochastic events. **Species is known from a single population in Caswell Memorial State Park (CA). Number of individual fluctuates drastically from 10 or less measured in 1985-86 after severe flooding to a recent peak population estimates ranging from 170-600 individuals occupying a 158 acre area. Species trend is listed as stable.**
Howell's spectacular thelypody	C1/C1	3	Most of former habitat has been destroyed through conversion into improved pasture or farmland. Little remaining habitat is almost entirely used for cattle grazing. Remaining sites have been grazed lightly or not at all largely by accident. Most of habitat destroyed at Rodeo grounds when parking area was paved in 1994. State (OR) listed as threatened, but state law is largely ineffective in providing protection for species on private land. **Species is known from 6 sites encompassing 144.5 acres containing 14,300 plants. Species trend is declining.**

TESTIMONY OF ROBIN L. RIVETT PRESENTED TO THE COMMITTEE ON RESOURCES, UNITED STATES HOUSE OF REPRESENTATIVES

Hearing on Endangered Species Act and
Lifting the Moratorium on Listings

June 25, 1996

Washington, DC

ROBIN L. RIVETT
Pacific Legal Foundation
2151 River Plaza Drive, Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

INTRODUCTION

On behalf of Pacific Legal Foundation and the Fairy Shrimp Study Group (FSSG), thank you for the opportunity to present testimony today on the Endangered Species Act (ESA). I am Rob Rivett. I am a lawyer and the Director of Environmental Law for Pacific Legal Foundation. I have also worked during the last year and one-half as an advisor to the FSSG. Over the years, I have had considerable experience with ESA which is probably the most powerful as well as uncompromising environmental law in this country. Because of these characteristics, it is very important that ESA be administered in a fair, ethical, and scientifically accurate manner. I am grateful you asked me here today to recount some of my experiences with the administration of the Act especially with the listing and delisting process and to offer suggestions on how to improve decisions made.

ESA contains few features that landowners, tax payers, or economists would embrace. Enacted in 1973, ESA is well-intentioned in its aim to prevent the extinction of important plant and animal species. However, after some 23 years, the results have been mixed at best. More and more species continue to be classified by the government as threatened or endangered yet few species ever listed have been removed from the list due to their recovery. Additional listings based on bad or paltry science have caused great concern and undoubtedly contributed to Congress' decision to impose a listing moratorium in April, 1995. Now that the moratorium has been lifted by the President's April 26, 1996, waiver action and Congress' has appropriated nearly $4 million for the Fish and Wildlife Services (FWS) listing program, it is useful to examine FWS' past record and present strategies to meet its ESA responsibilities. With increased listings, America experiences ever escalating restrictions on how and even whether certain private properties can be used by their owners. PLF and FSSG are very concerned about these seemingly endless restrictions, many of which are apparently designed to control land use rather than protect species and rehabilitate their habitat. PLF and FSSG are pleased to share with the Committee examples of such ESA misuse and suggest ways to avoid these problems in the future.

Pacific Legal Foundation is a nonprofit, public interest law organization with over 20,000 members, contributors, and supporters throughout the country. Since its establishment in 1973, the same year the ESA was enacted, PLF has engaged in research and litigation over a broad spectrum of public interest issues. PLF supports the concept that

governmental action should be limited to a legitimate scope of authority, and that governmental decisions should reflect a careful assessment of the social and economic costs and benefits involved.

One of the basic philosophies of PLF is that the development of governmental policy for environmental and land use issues should include concerns for the economy, employment, property rights, and general welfare of the public as well as concern for the environment. In short, PLF advocates a broad view of the public interest and seeks to ensure that balance and common sense are the bases on which laws and regulations are adopted, interpreted, and administered.

PLF has litigated numerous cases from state courts to the United States Supreme Court in order to fight for the constitutional rights of property owners. For example, PLF attorneys represented the Nollan family in *Nollan v. California Coastal Commission*,[1] one of three landmark property rights cases decided by the United States Supreme Court in 1987. PLF participated in the other two 1987 cases as amicus curiae[2] just as it did in the two most recent Supreme Court cases in 1982 and 1984 which further refined the interpretation of the Takings Clause of the Fifth Amendment of the United States Constitution.[3] The Foundation has also participated in numerous cases involving the implications of endangered species,[4] wetlands,[5] and other environmental regulations including several cases where millions of dollars have been awarded to property owners who

---

[1] 483 U.S. 825 (1987).

[2] *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

[3] *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992); *Dolan v. City of Tigard*, 512 U.S. ___, 129 L. Ed. 2d 304 (1994).

[4] *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981); *Sweet Home Chapter of Communities for a Great Oregon v. Lujan*, ___ U.S. ___, 132 L. Ed. 2d 597 (1995); *Bennett v. Plenert*, 63 F.3d 915 (9th Cir.), *cert. granted*, 64 U.S.L.W. 3635 (March 25, 1996) (No. 95-813).

[5] *Ocie Mills and Carey C. Mills v. United States of America*, 36 F.3d 1052 (11th Cir. 1994).

were denied Section 404 dredge and fill permits by the Corps of Engineers.[6] Because of our long held interest in a reasonable, balanced response to national environmental concerns and in the protection of private property rights we appreciate this opportunity to submit testimony.

The Fairy Shrimp Study Group is an organization of California businesses and statewide associations who organized to reevaluate the endangered status of four listed species of California vernal pool shrimp. FSSG includes the California Chamber of Commerce, the California Cattlemen's Association, Western Growers Association, and several private property owners. FSSG formed at the end of 1994 in response to the United States Fish and Wildlife Services's listing of three species of fairy shrimp and one species of tadpole shrimp as endangered or threatened. Our group suspected, as did many members of the scientific community, that at the time of listing at least two of the four species of shrimp (*Branchinecta lynchi* and *Lepidurus parkardi*) were not endangered. Our principal task was to gather more information and, if our suspicions were correct, to initiate delisting proceedings. As a result of that effort, the FSSG filed a delisting petition on February 29, 1996. To our knowledge, it has not been acted upon by FWS.

CALIFORNIA EXAMPLES

The citizens of California have been asked to shoulder substantial ESA protection costs due to California's unique status. Because of its climate and favorable geography, as of 1994 California provided a home for 128 federally listed species and had nearly 1,000 candidates for listing. 5 *Endangered Species Blueprint*, NWI Resource, Issue I.[7] A United States Fish and Wildlife Service' regulation protects endangered species habitat on private property and, as applied in this state, forbids many types of otherwise permissible, ordinary land use activities on millions of acres of private land.[8] Numerous

---

[6] *Formanek v. United States*, 26 Cl. Ct. 332 (1992) ($933,921 awarded) and *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) ($2.6 million awarded).

[7] That number has changed. The FWS recently stated that the current national backlog entails 243 proposed species waiting final ruling, 182 candidate species identified, and 57 petition findings pending. 61 Fed. Reg. 24722-23 (May 16, 1996).

[8] 50 C.F.R. 17.3 (1992).

examples exist detailing the enormous costs and administrative burdens private landowners have been forced to bear.

For example, the California timber industry has suffered staggering losses as a result of FWS' regulation protecting endangered species habitat at the expense of private property owners. The Wagner Corporation, a small family owned timber company established in Stockton, California, in 1895, owns and manages 3,400 acres of forest land near Garberville, California. During the 1993 and 1994 forest season, Wagner found a pair of nesting spotted owls (protected under the ESA) in the middle of an area then scheduled for logging. To prevent a "take" by modifying habitat Wagner could log only 45% of the trees selected for harvesting. As a result, the company's revenue losses approached $200,000. Since the area is on a 17-year rotation, Wagner will not be able to harvest the area again until the year 2012.

Eel River Sawmills, Inc. (ERS), is another small timber company located in Fortuna, California. Founded in 1948, ERS also has been economically injured by USFWS' determinations regarding the habitat needs of the spotted owl on private lands. Specifically, ERS has been required to leave untouched and standing several million feet of old-growth Douglas fir because according to USFWS any amount of harvest would harm habitat and thus result in the "take" of resident owls. The inability to properly manage its timberlands, in the name of species protection, has caused ERS to suffer considerable economic loss.

Schmidbauer Lumber, Inc., located in Eureka, California, has consulted with a small private property owner who also has suffered severe financial loss. Even though the property owner had completed all permitting requirements including all surveys for protected spotted owl and marbled murrelet necessary to proceed with a harvest under a state Non-Industrial Timber Management Plan, the property owner was told not to proceed because it was discovered that a *neighboring* property contained murrelet sightings. In order to proceed, a 300-foot no-harvest buffer and a seasonal harvest restriction (April 1-September 15) of one quarter mile buffer were required to be set aside to protect the murrelet.

Salmon Creek Corporation of Humboldt County, California, owns about 6,000 acres, 3,000 of which are a contiguous parcel of old-growth redwood and fir. The trees are past maturity and are no longer putting on additional volume, Consequently, they should be

harvested. Salmon Creek sought a timber harvesting plan from California Department of Forestry (CDF) for an eight acre road system to allow a wildlife survey and to facilitate future harvesting and removal of timber. Because CDF concluded, in consultation with FWS, that the property is suitable habitat for the marbled murrelet, a species recently listed as endangered under ESA, and might contain nests, ***no*** harvest will be allowed. The direct cost to Salmon Creek as well as the indirect costs to the local community will be in the millions of dollars. The company has filed regulatory takings cases in both state and federal courts in response to the denial of a permit to harvest.

And, in Sacramento, California, Sares-Regis Group, Inc., spent over seven years attempting to get approval to develop a 1,225 acre planned community. The planned community meets current and future area needs and is completely consistent with the Sacramento County General Plan. The Sunrise-Douglas project concentrates badly needed residential housing near both a major employment area and public transit, and is expected to bring badly needed new jobs to the Sacramento economy. The project contains some 85 acres of vernal pools[9] and other marginal wetlands.

Unfortunately, in September, 1994, three varieties of fairy shrimp and the vernal pool tadpole shrimp were listed by USFWS as protected species because of USFWS' unverified belief that habitat for the species is in jeopardy. Fairy shrimp are prolific and found in vernal pools, man-made stock ponds, drainage ditches, and even tire ruts. One of the three fairy shrimp listed as endangered and the one that is considered threatened are found on the Sunrise-Douglas property. Sares-Regis was required to modify its wetland mitigation plan to provide additional habitat for the fairy shrimp. The mitigation plan already called for setting aside 30% of the property as an open space and vernal pool preserve and for creating vernal pools offsite at a rate of 1.3 acres for each acre filled by the project. For a time, the only question was whether this important project could be kept alive in the face of increased habitat demands by USFWS. Fortunately those demands were met by Sares-Regis and the project is going forward but, of course, the increased regulatory

---

[9] Vernal pools are shallow depressions in the ground that fill with water during fall and winter rains and then evaporate in the spring. The water does not percolate downward because of an impervious subsurface layer such as clay, hardpan, or volcanic stratum. Thus, vernal pools are seasonal water bodies that generally do not exist in the hot and dry summer months.

costs, believed to be around $6,000 per new home, will be passed on to future home buyers. What is particularly unsettling is that the Fairy Shrimp should never have been listed in the first place.

UNINTENDED TOOL TO CONTROL LAND USE

The Act has turned into a mechanism to stop land use activities rather then protect species. The 1994 listing of Fairy Shrimp could be the most egregious example of such a misuse of the Act. Fairy Shrimp are very small freshwater crustaceans that have relatively short life cycles. They live in vernal pools and other ephemeral water bodies that appear only after it rains. Vernal pools form in areas were that are indentations and impermeable soils that retain water. In the spring and summer months, the pools dry up and appear to be dry open fields. When it rains in the winter, the pools form and remain for several weeks and then dry up after the rainy season. The shrimp hatch after the pools are inundated and lay eggs that survive through the dry season only to be hatched during the rainy season. A single pool can actually contain hundreds of thousands of eggs.

The listing of the California Fairy Shrimp has had enormous impacts on many sectors of the California economy. Because the potential range of these species of shrimp extends throughout the Central Valley from Redding to Bakersfield, approximately 400 miles long and approximately 200 miles wide, Californians have experienced a wide variety of economic impacts, including increased housing costs and increased cost to or termination of many infrastructure projects including road and bridge construction, drainage improvements, and water projects. Other impacts of the listing have included the delay or termination of plans to build elementary schools, mining projects, development projects, power co-generation facilities, and military base reuse projects. The listing also poses a serious economic threat to California's agricultural communities, both cattle ranchers and farmers, through disruption of routine practices for food and fiber production. An agriculture wetlands research project, as well as other biological research projects being conducted by agricultural farm advisors and university researchers have been terminated due to the listing.

The Fairy Shrimp Study Group spent considerable resources examining the issues surrounding this listing and found many problems in the Fairy Shrimp listing decision. The two most significant of these problems are: (1) **a complete absence of credible**

scientific bases for the original listing decision and (2) **no independent objective peer review of data underlying scientific studies and conclusions.**

FWS relied heavily on two studies to support the listing of the four shrimp. One of these studies, a 1978 unpublished unrefereed paper, estimated that 90% of vernal pools had been destroyed and the same author estimated in 1988 that the estimated loss of pools was 2-3% per year. Although these figures were somewhat discredited due to mathematical errors, their underlying message--that vernal pools had been decimated in California--was believed. In fact, the stated "90% loss" was so widely accepted it appeared in published articles and in many letters and reports supporting the listing. A number of these documents were prepared by well-respected, knowledgeable scientists. According to the listing record, none of these scientists reviewed the data nor the six page paper that presented this unsubstantiated hypotheses. At the time of the listing, there were no other studies reviewing the extent of the habitat nor the extensive range of the shrimp.

Surveys and reviews of soil data since the listing indicate that the historic loss is probably closer to 50% with most of that loss occurring many years ago when the valley was first converted to agricultural uses. Losses in the past few years appear to be minimal with little impact on the total remaining vernal pool acreage--approximately 1,000,000 acres.

The second study, along with its author's comments, was cited more times than any other study in the final rule (a record 41 times). It was a study of a utility pipeline right of way that was described as a "random 200 mile transect" in California. The authors of this pipeline study wrote to the service supporting the listing and suggested that, because the shrimp were found only on small portions of the transect, the shrimp were endangered. The final rule adopted this position and indicated that, because only a portion of the **200 mile** pipeline survey contained shrimp, these invertebrates were rare.

The FSSG discovered several problems with the claims associated with this study. First, the pipeline survey missed the most significant portions of the habitat. Attached is a map that graphically demonstrates the most glaring problem with drawing species-wide conclusions from this study. We plotted the original habitat estimates on a map with the pipeline right of way. As can be seen, the pipeline does not follow the habitat. Thus, the pipeline study clearly should not have served as a basis for scientific conclusions about the rarity of these species of invertebrates.

The pipeline study surveyed only 14 sites and a grand total of 60 vernal pools. Ten of the 14 sites are located within one Northern County--Tehama County. These sites were arbitrarily selected by the utility company yet no effort was made to develop a statistical link between these sites and the rest of the habitat.

Nevertheless, after submitting the study the biologists who conducted the study made some outrageous claims. Despite the **irrelevance** of the fact that the **pipeline** was 200 miles long (most of the 200 miles missed the vernal pool habitat), one of the researchers went so far as to write FWS a letter in which she used the 200 mile figure as a denominator in estimating the frequency of which these animals were found. She wrote that because *lynchi* and *parkardi* were found on only 10 **out of 200 miles** that they were found only 5% of the time. Despite these outrageous claims, a careful review of the study suggests that *lynchi* were found at 35% of the sites and *parkardi* at 43% of sites.

A second troubling aspect of the FWS' September, 1994, listing of the four Fairy Shrimp was FWS's unquestioning deference to the views of particular fairy shrimp "experts." Because vernal pools, and therefore fairy shrimp, are ubiquitous throughout the Central Valley and other parts of California, the failure to properly utilize the best scientific evidence in the listing process could have devastating economic impacts on the state. For example, because farming is by definition a land modifying activity and because Fairy Shrimp are very small species difficult to detect, there exists a strong possibility that routine farming activities could result in the accidental "taking" of the fairy shrimp. Thus, in order to avoid violating ESA, necessary farming activities such as plowing may have to be avoided.

Because of these potential impacts, it goes without saying that this data must be credible and verifiable to ensure a valid listing. The only way to adequately provide this insurance is through independent peer review. Apparently, FWS now recognizes this peer review prerequisite but, unfortunately, FWS did not apply it at the time of the fairy shrimp listings.

On July 1, 1994, prior to the listings the FWS announced an "interagency policy to clarify the role of peer review in activities undertaken by the Services under the authority of the Endangered Species Act." 59 Fed. Reg. 34,270. The peer review policy was implemented to ensure that the best biological and commercial information was being

utilized in the decision-making process. 59 Fed. Reg. 34,270. With regard to the listing of a species the policy provides that FWS should:

> (a) Solicit the expert opinions of three appropriate and independent specialists regarding pertinent scientific or commercial data and assumptions relating to the taxonomy, population models, and supportive biological and ecological information for species under consideration for listing;
>
> (b) Summarize in the final decision document (rule or notice of withdrawal) the opinions of all independent peer reviewers received on the species under consideration and include all such reports, opinions, and other data in the administrative record of the final decision.

59 Fed. Reg. 34,270.

In a letter dated March 19, 1995, to the Honorable Richard Pombo, Assistant Secretary for Fish and Wildlife and Parks, George T. Framptom, Jr., stated that FWS had sought scientific peer review in compliance with these guidelines. However, this has turned out not to be true and is no longer claimed by FWS. Instead FWS now argues it did not have to follow the guidelines because the public comment stage of the Fairy Shrimp listing process had concluded by July 1, 1996! Nevertheless, FWS still claimed they engaged in adequate peer review. In actuality, the peer review process followed was woefully inadequate.

The final rule failed to specify three experts whose opinions were solicited regarding the scientific justification for the conclusion that the fairy shrimp are endangered and in need of federal protection. 59 Fed. Reg. 48,136. Nor did this rule summarize the opinions of independent peer reviewers on population models or supportive biological and ecological information that resulted in the fairy shrimp listing. Testifying before this Committee's Task Force on the Endangered Species Act, Dr. Denton Belk, probably the leading scientific expert on fairy shrimp and one of the scientists FWS claimed had reviewed

the listing of the fairy shrimp, stated that FWS had not provided him with any maps regarding the fairy shrimp, nor had they asked him any questions about the mapping of populations. When asked if he had received a complete package of scientific conclusions, recommendations, and supporting data on which listing conclusions were based for the purpose of peer review Dr. Belk responded that he had not. Obviously, failure to provide the reviewing scientists with the data utilized in the FWS listing process pretty well forecloses "independent peer review."

In the Final Rule listing the four invertebrate species, FWS placed great reliance on the comments of Dr. Marie Simovich, Dr. Richard Brusca, and Jamie King. 59 Fed. Reg. 48,136. These are three of the scientists FWS claimed were involved in the "independent peer review" process. However, these individuals did not "review" the scientific studies and data relied on by FWS nor the conclusions reached by FWS; instead, they submitted their own scientific data and opinions as comments on the propriety of the listings. Nowhere in the Final Rule is there any indication that these individuals reviewed the adequacy or accuracy of or the support for FWS's conclusion that the four species were in need of federal protection.

Biologist Paul Sugnet noted the shortcomings of the fairy shrimp peer review process in his testimony before this Committee's Congressional Task Force on the Endangered Species Act. According to Mr. Sugnet, reviewers should consult with all those who have contributed significant data and peer review should not be conducted behind closed doors, as it was in the case of the listing of these species.[10]

---

[10] The 1993 study submitted to FWS by Sugnet & Associates demonstrated a vernal pool habitat survey by Dr. Robert Holland which FWS had relied upon in its Proposed Rule, contained arithmetic errors in the estimates of historical vernal pool habitats. 59 Fed

(continued...)

Many of the problems associated with this listing's lack of science can be attributed to the secretive nature of FWS' decision-making process as well as the obvious underlying goal of FWS to control land use in the Central Valley. An example of this problem can be seen in the Fairy Shrimp population maps relied upon by the FWS to delineate known populations.[11] FWS claimed in the final rule that, although the invertebrates were found in 350 and 180 separate locations for 2 of the species, these locations could only be described as 18 populations and 32 populations. No explanation of its definition of population was provided nor did the maps provide an explanation. Furthermore, FWS claimed that all but 4 of the 18, and 4 of the 32, populations were under threat. Again, no explanation for these conclusions was made.

---

[10] (...continued)
Reg. 48,144. The Sugnet Study also led FWS to the conclusion that the California linderiella, the fifth shrimp species proposed for listing, was not likely to become either threatened or endangered in the foreseeable future. 59 Fed. Reg. 48,136, 48,141. In addition, the Sugnet Study shows there is a sharp divergence of scientific authority on the question of whether the other fairy shrimp are in need of federal protection. It was based on a survey of 3,092 vernal pools located throughout the California central valley, the study also included a literature review and compiled field surveys which had been conducted by others. The findings of the Sugnet Study stand in stark contrast to the conclusions reported in the Proposed Rule. For example the Sugnet Study found vernal pool fairy shrimp in 178 vernal pools, swales, and railroad ditches, as opposed to the 30 vernal pools and swales, reported in the Proposed Rule. In response the Final Rule criticized the Sugnet Study for overestimating the actual population numbers for the fairy shrimp, but this was done without any independent peer review. The process of peer review is designed to evaluate all scientific data put forth and to determine which study, or studies, represents the "best scientific and commercial data available." Unfortunately, in the fairy shrimp listings, there was no independent scientific judgment as to what data contained the most accurate and reliable information.

[11] The base maps for these populations were developed by Sugnet & Associates and submitted to the FWS to demonstrate the extensive range and numbers of three of the Fairy Shrimp species. Although the Sugnet Study was criticized by FWS in the final rule because it drew conclusions based on individual location data points instead of on what FWS characterized as populations, it nevertheless served as the basis for FWS' calculations about populations.

There are several problems with the maps. Although the population designations are key to the listing decision, there are **no studies** in the record that support FWS' population delineations. FSSG repeatedly asked for such information and have been told it does not exist. The base maps for the populations show detail only to township level. One cannot determine by these maps where, within 1 of these 36 square-mile boxes, shrimp were found. In some cases, the shrimp were found in a variety of areas throughout the township and, in some cases, in only one discrete location. FWS' population boundaries do not take these differences into consideration. In fact, no population line ever crosses a township boundary. This fact would suggest that no river, mountain, valley, watershed, or other population defining geographic feature ever crosses a township boundary. We know this is not the case and that the designation of these population boundaries has little scientific support.

With these major flaws evident, the FSSG decided to be completely open about what it was doing and share its information with FWS and the Department of the Interior. FSSG truly believed that, with cooperation, it would never have to get to the point of submitting a delisting petition. The listing mistakes are so glaringly obvious and the science is so poor that FSSG naively thought someone from FWS would step forward with some academic integrity to clear up the problems.

What has actually happened is **NOTHING.** Although FSSG received a November, 1994, letter from the Secretary of the Interior's office stating it would commission a special science panel to review the status of the shrimp, nothing happened. FSSG presented its information to the Department of the Interior, met with the assistant director of FWS, and met with the head of FWS Region IX. FSSG met with the Deputy Secretary of the Interior three times and was told the listing problem would be corrected.

When nothing happened, FSSG filed its February 29, 1996, delisting petition. We are still waiting. Clearly, our experience shows it is time to improve administration of the ESA to avoid similar problems in the future. We must avoid listings based on inadequate, deficient science; we must require honest, timely delisting petition considerations; and we must forego management by litigation. In short, we must return some balance and reason to species preservation.

RECOMMENDATIONS

PLF and FSSG believe there are many changes which must be ***considered*** before the ESA can ever effectively accomplish its goal of protecting and conserving wildlife species. For example, should the criteria for listing species be expanded to include consideration of:

a. the recoverability and cost of recovering a species;

b. the economic and social benefit of a species;

c. the social and economic harm from listing a species;

d. the increase for loss of employment as a result of listing a species;

e. whether there are reasonable alternatives to a listing, such as a captive breeding program, that will preserve the species from extinction;

f. whether the scope of critical or essential habitat is definable thus allowing private property owners reasonable expectations as to how they can use their property; and

g. whether species should be broken down into subspecies and distinct population segments for listing purposes.[12]

---

[12] Currently under the ESA, the term species includes any subspecies of fish, wildlife, or plants and any distinct population segment of species of vertebrate fish or wildlife. 16 U.S.C. § 1532(16). Species is a term generally used to identify those individuals actually (continued...)

Likewise, should Congress consider altering the Act to give private property owners positive economic incentives to provide species habitat as a better, more efficient, and cost effective way to protect threatened species?

All these issues are worthy of serious consideration but, because the focus of this hearing is on listings, we will address our recommendations to that issue. Species listings must be based on better scientific evidence. Evidence must be scientifically valid, which means it must be peer reviewed and statistically significant. A minimum level of field studies and surveys should be conducted by federal personnel or other nonvested interests prior to listing and scientifically valid public input must be considered. If public input is not considered scientifically valid, the basis for this determination must be fully and openly explained. Additionally, all administrative records of the listing process must be open to public review and comment to ensure above board and professional decisionmaking. In this

---

[12] (...continued)
or potentially capable of reproducing among themselves but incapable of reproducing with other organisms. The ESA allows species to be broken down further by "subspecies" for listing purposes. Unfortunately, the act of identifying subspecies is highly subjective. Some scientists recognize significant variation in a species without finding a subspecies. Others look for subtle differences in coloration, markings, behavior, and range to establish a separate taxonomic unit and thus subspecies. As an illustration of this methodological conflict, some scientists recognize 74 species and subspecies of the Grizzly Bear while others recognize only one.

Regarding distinct population segments, as the ESA is now written, a separate population can be listed even if the species as a whole is flourishing. This provision allows the ESA to be manipulated to stop unwanted economic activities rather than to protect truly jeopardized plants and animals. The absurdity of such listings was underscored by the humorous filing in 1994 of a petition to list as endangered the Amish and Mennonites. The petitioner argued that these groups of people (animals) meet the criteria of the Act because they each compose a distinct population of mammals with a gene pool that is maintained in a fairly pure state by isolation accomplished by their traditions, culture, customers, and habits. The petitioners compared their eligibility for listing to the Winter Run Chinook Salmon in the Sacramento River which has some genes mixing with the late Fall Run Chinook Salmon but is nevertheless listed as an endangered distinct population segment of a subspecies. Of course, the listing of the Winter Run can cause significant economic harm to agriculture, limiting water diversions for crop irrigation.

way, there would be fewer chances for biased, unsupportable listing or delisting decisions based on little meaningful evidence. Although the present level of acceptable evidence--"best scientific and commercial data available," 16 U.S.C. § 1533(b)(1)(A), may permit a lower administrative standard, what is "available" is not necessarily adequate or valid! To ensure public trust, a higher standard must be maintained.

FWS' May 16, 1996, listing priority guidance[13], and its July 1, 1994, peer review policy guidance[14] purport to recognize these needs with regard to the listing process. However, it remains to be seen whether adequate, independent peer reviewed, statistically significant, publicly available data will guide FWS in future listings. Certainly our experience with the Fairy Shrimp listing process raises doubts.

With regard to species delisting, as can be shown from our experience, the FWS places this activity in a very low priority position--the lowest. We were told by Deputy Secretary of Interior Garamendi during the moratorium on "new listings," that it would be illegal at the time for FWS personnel to do any work towards processing FSSG's delisting depetition. He urged us to support Congress' full funding of ESA so **all** ESA activities could go forward, including our delisting petition. Now that the funding has been provided, we still find our petition ignored with FWS admitting it won't even get to it this fiscal year. Quite frankly, such prioritization demonstrates that FWS continues to be committed first and foremost to controlling land use. FWS seems to have little interest in demonstrating that, under the current ESA, when mistakes are made, they can be corrected. This attitude needs to be changed. We would recommend that the best way to ensure such commitment to a

---

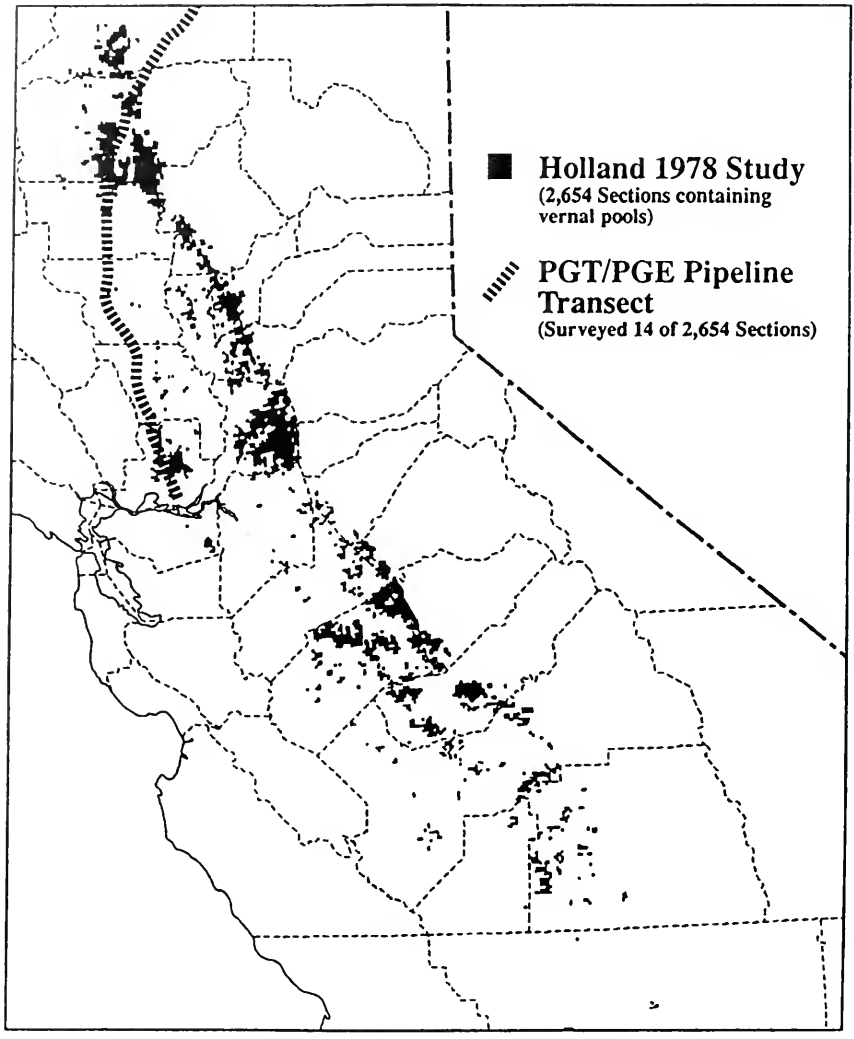
[13] 61 Fed. Reg. 24,722.

[14] 59 Fed. Reg. 34,270.

fair, even-handed processing of delisting as well as listing petitions is to (1) require that the above-suggested standards are met, and (2) allocate separate appropriations for listing activities and separate appropriations for delisting activities. Moreover, delisting criteria and standards should be the same as for listing. Simply put there should not be a higher standard for delisting than for listing. Either a species is in need of protection or it is not.

In closing, PLF and FSSG thank the Committee on Resources for this opportunity to offer their concerns about the ESA listing and delisting process. The ESA is an important Act. However, without changes in the way listing and delisting petitions are administered, ESA's important goals won't be reached; rather this country's citizens will continue to view the Act as unbalanced and unfair. For this Act to succeed, this Nation's private property owners must view species and habitat preservation to be in their best interests. This will only happen when the Act and FWS recognize that not all species can or should be saved; that the social, economic, and land use consequences of listings are relevant to the listing process; that litigation should be eschewed as a driving force behind ESA listing and management decisions; and that private property owners must not be economically disadvantaged by FWS administratively turning their lands into preserves for listed species. If this country wishes to protect its sensitive species, it must find a way to spread the cost of protection to those who are benefitting--everyone.

Thank you.



PGT/PGE Pipeline Route vs. Vernal Pool Areas Identified by Holland 1978.

Fairy Shrimp Study Group. 1995

Testimony of Dennis Hollingsworth, representing Riverside County Farm Bureau to the Committee on Resources, US House of Representatives Honorable Don Young, Chairman June 25, 1996

Section 4 (b)(3)(A): To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States code, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

–The Endangered Species Act of 1973 as amended

Thank you, Mr. Chairman, for the opportunity to speak to your committee today. I am representing the Riverside County, California, Farm Bureau as their Director of Natural Resources. We represent the interests of over 1,700 member families from throughout the county. Riverside County Farm Bureau is affiliated with the California Farm Bureau Federation and the American Farm Bureau Federation. Together we represent the interests of over 4 million of the nation's farmers, ranchers, and rural communities.

I would like to tell you about experiences over four years in the preparation and submission of a petition to delist a species that has never been in any danger of extinction.

As you know, the endangered listing of the Stephens' kangaroo rat has caused severe problems in our county. Since its listing in 1988, many of our farm families have suffered economic loss, restrictions on the normal use of their properties, and diminution of the value of their most important asset, their land. You are well acquainted with the terrible injustice done to the Domenigoni family, and the devastation of 29 homes caused by an out of control wildfire, exacerbated by Stephens' kangaroo rat restrictions, in the Winchester area of the county in 1993.

A few years ago, members of our board of directors began to wonder how a species that was supposed to be so rare, could be causing such widespread upheaval throughout a vast portion of our county. After the listing and the imposition of a regional Habitat Conservation Plan effort, Stephens' kangaroo rats began popping up all over the place. It seemed anywhere an economic activity or new land use was about to occur, kangaroo rats would be found, and extensive surveys would have to be performed, and expensive fees paid.

In March of 1992 I was hired by the Farm Bureau to investigate the status of the k-rat. Based on this research, I prepared a delisting petition, (asking for the Fish and Wildlife Service to remove the species from the list.) They had no idea what the scope of the effort they were taking on would entail. With little experience dealing with federal agencies or kangaroo rats, I had no idea what I was getting into, either.

The first item of business the petition was to find out what was known about the species and discover under what circumstances the species was listed. To do this we first requested the files and reports on the species from our local office of the Fish and Wildlife

Service, in Carlsbad, California. The result was a handful of reports and documents handed over, reluctantly and sporadically. After a several months of requests, and despite assurances that we had received the entire file on the k-rat, we felt there had to be more in the Service's files on the species. In order for our friendly request to be taken seriously, we had to file a Freedom of Information Act request.

Our request was received at the regional office in Portland on August 13, 1992. Shortly thereafter, we received a reply assuring us they would quickly assemble all of the records and make them available to us in the Carlsbad office for review.

After months of waiting, prodding and appeals, and despite statutory requirements in FOIA requiring adherence to strict response deadlines, we finally received the last of the materials we had requested on May 13, 1993. This was nine months after the Service had received our request. However, we were not finished battling the Service over what we should be allowed to see in the k-rat reports.

Central to our argument that the species is not endangered is not only finding out how many populations of the species are known to exist, and also where these populations are. Answers to questions such as: Are the k-rats using habitat that is different than what was once thought to be unsuitable? Are the populations on lands that are government owned, or otherwise safe from urban development? And, most importantly, are populations of this species being discovered far outside what was thought to be a small, localized range? were essential to our case. (Incidentally, we were eventually able to learn that the answers to all of these questions are yes.)

The Service wanted to heavily censor all of the reports that indicated the presence of the species. Among the information they sought to censor were any references to the locations of Stephens' kangaroo rat populations. As a result, the first reports we received from the Service were essentially useless in developing a picture of the status of the species for a delisting petition. After some protest, we were able to get the Service to only censor the exact locations of the populations, and information about who the private landowners were that had k-rats on their land. These reports are still highly censored, and made it very difficult to find the information we needed to make our case. I have included examples of these censored reports with this testimony.

Interestingly, the Service was extremely concerned about protecting the privacy of landowners when it came to letting us know if they had endangered species on their land. It seems the federal Fish and Wildlife Service, sought to protect the privacy of landowners from their local association of farmers and ranchers. Yet, most landowners were, and remain unaware that each and every time there is a survey performed on their land for an endangered species by a private biologist who holds a scientific study permit under section 10 of the act, a copy of the survey automatically goes to the local office of the Service. Often, we found that the copy got to the Service long before the actual report got to the private landowner paying for it.

Another stated reason for not releasing the exact locations of the k-rats was that their disclosure might endanger the safety of the populations. In other words, we might go out and destroy k-rats and their habitat if we learned of their locations. While this is carrying national security concerns to new heights, it also points out the inherent problem with the ESA itself, and it shows that the Service is well aware of the disincentives to conservation presented by the current Act.

By so zealously protecting the locations of endangered species, the Service admits that the Act has created powerful disincentives to conserve species. No law that depends so heavily on the goodwill of the nation's private landowners can ever succeed without the support of those landowners. The fact that the Service fears for the k-rats' safety if landowners knew they lived on their land shows that the incentive in this top-down, command and control ESA is for landowners to destroy, rather than conserve species and their habitats on private land. This is the unfortunate adversarial situation landowners and America's wildlife have been placed in by this ill conceived law, and is a testament to its failure.

I could spend several hours just telling you some of the interesting and shocking things we learned through this process. Let me discuss only a few.

Our investigation has revealed that the Stephens' kangaroo rat is not now, nor has it ever been in any danger of extinction. The Service's assumptions that the species' range, habitat requirements, population size, population density, protected populations, reproductive ability, ability to persist in small patches, coexistence with human disturbances, and colonization capability were all substantially underestimated. Likewise, the Service's analysis of the threats to the species were grossly overestimated and purposely exaggerated. For your convenience, I have included a copy of our petition with my testimony.

As the implementing agency of the laws you make, the public places a great amount of trust in the Fish and Wildlife Service not to abuse the large amount of discretion in their hands. Unfortunately, we discovered that incidences of abuse of this discretion were frequent throughout the record for the k-rat.

One such example was the method by which the species was determined to be endangered, rather than threatened. In the entire record presented to us through the Freedom of Information Act, only one, single page document was all that we could find that provided any clue as to how the Service determined to list the k-rat as endangered rather than threatened. This was a record of a telephone conversation that I would like to read for you.

It is a record of a conversation between the biologist in the local Service office who was preparing the listing package, and someone named Ron Nowak in the Office of Endangered Species.

> The record says: *"Ron called and asked some questions about the Kangaroo Rat package. He said that in general I had presented a good case. He wanted the acreage figures clarified and some place names clarified as well. He wanted to know how much habitat is left.*
>
> *"I as best as I could came up with some acreages.*
>
> *"We then discussed whether threatened or endangered status would be more appropriate. We decided upon endangered."*

In an entire record of over 20,000 pages and hundreds of surveys, reports, meeting records, agendas, and documents of all types, this is the only evidence we can find of any analysis as to why the species should be listed under the more onerous status of endangered, rather than threatened.

After this research and several months of writing, the Riverside County Farm Bureau submitted its delisting petition in April of 1995. Let me quickly recount to you what has happened or, maybe more appropriately, what has not happened since then.

• **March 1995:** Secretary of the Interior Bruce Babbitt announces his ten point "reform" initiative for the implementation of the Endangered Species Act. Included are points calling for scientific peer review, and a commitment to greater responsiveness and cooperation on the part of the US Fish and Wildlife Service with those who have to deal with the Act.

• **April 26, 1995:** The Riverside County Farm Bureau files a petition with the Fish and Wildlife Service to delist the Stephens' kangaroo rat. On May 12, 1995 a foot high packet of scientific studies, biological surveys, internal memoranda, and other documents obtained from the Service through the Freedom of Information Act, and used by the Farm Bureau in the preparation of the delisting petition, is hand delivered, by me, to the Carlsbad office of the Fish and Wildlife Service.

• **August 1, 1995:** After inquiring about the status of the delisting petition and informing the Service of their failure to comply with the 90 day finding obligation, I was informed by the Carlsbad Field Supervisor that the Service "will soon be publishing a finding" in the Federal Register. The following day, the Farm Bureau is contacted by a Service biologist who claims not to have received the background packet of scientific information (obtained by the Farm Bureau from the Service's files) that was hand delivered, by me, to the Service in May.

• **October 31, 1995:** With a cover letter signed by you, Mr. Chairman, and our Congressional representatives Ken Calvert and Sonny Bono, along with several other local congressmen, the petition and background packet are resubmitted to Mollie Beattie, Director of the Fish and Wildlife Service, on behalf of the Farm Bureau. Beattie acknowledges receipt of the petition and background packet.

• **October 1995 through April 1996:** Fish and Wildlife Service claims that the moratorium imposed legislatively by Congress on listings under the ESA also prohibits the processing of delisting petitions, though the moratorium specifically exempts (allows) the processing of permits and other actions which result in less regulation, (including delisting petitions.)

When informed of this, the Service responds that federal government shut downs and operating under Continuing Resolutions prohibit them from processing delisting petitions. "We are under a strict moratorium not to process any listings or delistings while operating under these CR's." says the Field Supervisor of the Carlsbad office.

• **May 1996:** Fiscal year 1995-96 Federal Budget is approved and signed by the president. Over one year after submission of the petition to delist, the Service is still unable to provide an estimate as to when they will publish their 90 day finding, other than "soon."

On May 8, 1996, Secretary Babbitt appeared in Riverside at a press conference to sign the section 10(a) permit for the long term HCP for the k-rat. After his remarks, I was able to remind him of his ten point "reform" initiatives of a year ago, including greater responsiveness by the agencies. I informed him of the lack of the lack of compliance by his agency, and asked whether he could provide us with an estimate as to when the Service might be able to process our petition and finally provide us with a 90 day finding.

The Secretary's somewhat irritated response was that I should be not be speaking with him, that I should be speaking to my congressman, and ask for more money for the ESA. When I asked if that meant he was saying that there was money in the budget for processing listings, but no money for processing delistings, his reply was "absolutely." When I reminded him that the Act didn't appear to differentiate the processes, that the two were to receive the same processing priority, he became very irritated, and stormed away from me and a group of friendly reporters waiting to ask him questions.

As someone with no formal education in law, perhaps I was presumptuous to engage in legal arguments with a former attorney general and someone occasionally mentioned as a possible Supreme Court nominee. But the law seems pretty clear on this point.

The Secretary's reluctance to process delisting petitions is not only, in my opinion, contrary to the law, I also think it is bad policy. After all, the whole point of the ESA is to list a species in trouble, get it recovered, and then delist it. When the public loses confidence in those who enforce the laws, when they clearly see that the one portion of the law is being implemented unjustly or unfairly over another, they begin to mistrust the application of the whole law. In time, the mistrust spreads to other laws.

When a law such as this creates perverse incentives, in that it actually encourages landowners to go out and destroy habitat for all species, not just endangered species, it must be rethought. In Riverside County, where people have been so severely impacted by this listing, farmers, ranchers, and small property owners are actively working their lands, disking, dragging, whatever method it takes, to make sure no species that might even be remotely sensitive takes up residence on their land. They are doing this, not out of hostility toward the species, but in efforts at self preservation. The presence of a listed species on private land has come to mean financial ruin, and possibly the loss of one's livelihood. These reactions by property owners show that this law is a complete failure.

The Secretary's priorities, rather than showing that the current ESA is workable and does not need reform, and the blatant disregard for the sections of the Act that are distasteful to his administration, coupled with the fact that the Act is working at cross purposes for wildlife on the nation's private lands, show that the Act must be totally reworked and rethought before it can be successful.

What is needed is an Endangered Species Act that conserves species, by allowing and encouraging landowners, farmers and ranchers to be good stewards of the land. It should also be an Act that is so simple as to be immune to the bureaucratic evils that so often do not become apparent until years after the bill has left Congress and become law. In order to have an Endangered Species Act in which the agencies can no longer twist, ignore, subvert and use both the scientific evidence and the statutory processes to further a political or ideological agenda, it must be a law that is simple, incentive based, and non-regulatory. Our experience has shown us that, given the regulatory power and the wide latitude of discretion by the courts, the agencies will be sure to abuse and ignore the intent of Congress to make a law that is successful for conservation of wildlife, and also upholds the rights and freedoms of the people it affects.

While it has been a few days since I've checked the Federal Register, which, incidentally, arrives on my doorstep everyday, like most all members of the regulated public, I don't think the Service has published a 90 day finding yet, after having our petition for 425 days.

[redacted]

[redacted] Riverside [redacted]

June 11, 1989

Reply to: [redacted]

[redacted]

Dear [redacted]

On June 8, 1988, I met with [redacted] to discuss the restoration of some of the areas removed from the [redacted] SKR preserve study area. It was not our intention to enlarge the park boundary, but to expand the study area around the park to include the parcels along [redacted] beginning with [redacted] on the west and extending to [redacted] on the east. (map enclosd.) A consensus was reached that a proposal to that effect would be made at the July 14 Task Force meeting.

In order to make a biologically valid decision, we need your research, expertise and comments on the following questions:

(1) Do past and recent (1988-1989) trapping surveys show a SKR population on any of these parcels outside of the current park boundaries?

(2) If so, where? If not, is trapping planned for this area?

(3) Biologically, are these areas necessary to the viability of [redacted] as a viable habitat? Either as actual habitat or as critical buffer? What is the biological basis/research for that conclusion?

(4) Is the viability of [redacted] as a SKR preserve critical to the overall HCP? If [redacted] fails, will the Fish and Wildlife Service reject the interim HCP? Without [redacted] how many viable preserves are left? What is the habitat size of each one?

(5) What about the option of increasing the preserve area only part way to [redacted] or of including the ten acre strip along [redacted]

(6) Can you predict the effect of prosecution and court-ordered mitigation against [redacted] as adding habitat to the HCP in [redacted] or elsewhere?

(7) As to the corridor from the park south across [redacted] to connect with the [redacted] land south of [redacted]
--Will March actually be a preserve?
--If not guaranteed, what's the point of a corridor?
--If is guaranteed, what is the biological basis for the placement of the corridor at its present location and size as opposed to any other location and size?

(8) What is the estimated current cost of each of the parcels under consideration above? Including the cost analysis of the [redacted] property, considering its quasi-public status?

As you can see, the discussion centers around three unknowns which are critical to any further consideration of restoring any particular parcel, or part of a parcel, to the study area around the park:

(1) Is it good SKR habitat or buffer?

(2) Is it necessary?

(3) What is its cost?

These three questions should be addressed to the following options:

(1) All of the private and [redacted] land indicated on the enclosed map.

(2) [redacted] property.

(3) The private and [redacted] property bordering the park which is SKR habitat.

Thank you again for your help. I will be happy to meet you at the park and walk over the parcels in question, especially with someone you consider qualified to identify Stephens' and Pacific habitat. Please call me if I can be of any further assistance.
[redacted]

Sincerely,

[redacted]

cc:Bob Wales, Riverside City Manager
Bill Havert, Sierra Club
Steve Whyld, Riverside City Planning
Randy Hall, BIA
Lisa Boehn, Tierra Madre
Paul Selzer, Best, Best and Krieger
Peter Stine, US Fish & Wildlife Service

Michael Brandman Associates [redacted] Planning [redacted] Management

October 23, 1989

Mr. Peter Stine
U.S. Fish and Wildlife Service
Enhancement Field Station
Federal Building
24000 Avila Road
Laguna Niguel, California 92677

Subject: Proposed Stephens' Kangaroo Rat Trapping Program, under Regional Blanket Permit PRT 702631, Subpermit FRIERD-1, dated April 21, 1989 and Subpermit PRICMV-1, dated June 22, 1989. [redacted]

Location: [redacted]

Dear Mr. Stine:

Michael Brandman Associates, Inc. (MBA) is under contract with [redacted] to perform a trapping program for the Stephens' kangaroo rat (SKR) proposed development site located [redacted] Diagnostic kangaroo rat sign has been located by MBA on this project site.

The purpose of the trapping program is to determine if the SKR is present on the site. The trapping will be performed under the guidelines set by the General Permit Conditions that accompany our Trapping Permit.

The approximately 40-acre project site is a narrow strip of land that lies [redacted] Only certain parts of the project site, as indicated by the attached map, will be trapped.

I would like to begin the trapping program for the site on the evening of October 30, 1989.

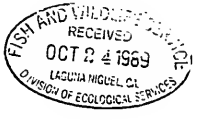
Thank you for your prompt attention to this matter. Please FAX a written response to me as soon as possible at (714) 889-0152.

Sincerely,

MICHAEL BRANDMAN ASSOCIATES, INC.

Philip Behrends

Philip R. Behrends, Ph.D.
Staff Ecologist



[redacted]

Enclosure

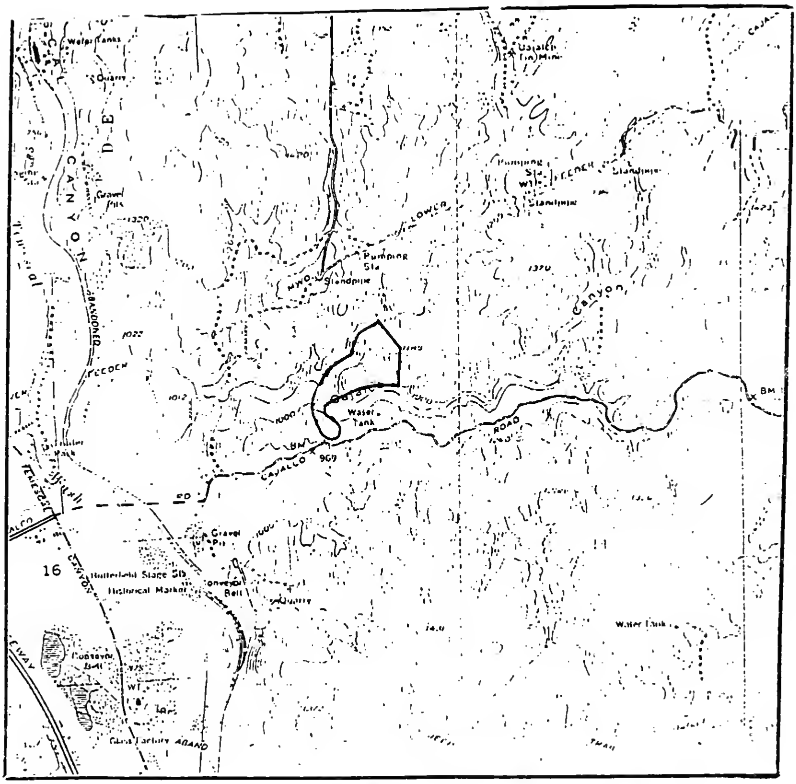


FIGURE 1 VICINITY MAP for [redacted]

N

—— PROPERTY BOUNDARIES

SCALE: 1"= 2000'

MAP SOURCE: USGS 7.5' [redacted] QUADRANGLES

TELEPHONE CONVERSATION RECORD

DEPARTMENT OF THE INTERIOR
U.S. FISH AND WILDLIFE SERVICE

ROUTING

1		4	
2		5	
3		6	

DATE: Feb 13-20

FILE REFERENCE: SKR

NAME	ORGANIZATION AND TELEPHONE NUMBER
TO Ron Nowak	K. Kramer
FROM DES	

SUBJECT:

CONVERSATION

Ron called and asked some questions about the Kangaroo Rat Package. He said that in general ~~it~~ I had presented a good case. He wanted the acreage figures clarified and some place names clarified as well. He wanted to know how much habitat is left.

I did the best as I could come up with some acreages.

We then discussed whether Threatened or endangered status would be more appropriate. We decided upon endangered

FORM 9-46 (11/81) WHITE: ROUTING COPY YELLOW: SUBJECT FILE COPY PINK: CHRON FILE COPY

Riverside County
FARM BUREAU NEWS

Published by Riverside County Farm Bureau, Inc.
A private, nonprofit organization serving farmers throughout Riverside County since 1917

Farm Bureau petitions to delist the Stephens' kangaroo rat

Citing original data errors in the "endangered" listing of the Stephens' kangaroo rat, Riverside County Farm Bureau has submitted a petition to the U.S. Fish and Wildlife Service to remove the kangaroo rat from the endangered species list and expects a decision by USFWS by the end of July.

However, a Farm Bureau spokesman said the Farm Bureau isn't sure when USFWS will respond or what their decision will be. "Our petition is supported by hundreds of pages of studies, reports and other information which may take some time to review."

"While we are confident that the petition proves beyond any doubt that the Stephens' kangaroo rat was never in danger of extinction, we don't know if the Service will admit its mistake."

Farm Bureau said a large part of the scientific evidence it found to support its delisting was known to USFWS prior to the 1988 listing. Farm Bureau said USFWS disregarded and even concealed information showing the kangaroo rat was far more prolific and widespread than the listing indicated and that enough habitat was protected to guarantee the species survival.

The petition was written by Dennis Hollingsworth, director of natural

Continued inside on Page 2

Petition to Delist the Stephens' kangaroo rat

Following is the text submitted by Riverside County Farm Bureau to the U.S. Fish and Wildlife Service.

Riverside County Farm Bureau, Inc., hereby petitions the United States Fish and Wildlife Service to delist the Stephens' kangaroo rat (Dipodomys stephensi) under the Endangered Species Act of 1973 and its amendments.

The petitioner requests this delisting because of original data errors in the listing of 1988. Investigation by the Farm Bureau has revealed a significant amount of scientific evidence that SKR is not now and never has been in any danger of extinction. Assumptions by U.S. Fish and Wildlife Service regarding species range, habitat requirements, population size, population density, protected populations, reproductive ability, ability to persist in small patches, and colonization capability were all substantial underestimations. Assumptions by U.S. Fish and Wildlife Service regarding threats to SKR, including percentage of lost historical habitat, rate of loss of habitat, impacts from rural development and agriculture, and urban growth patterns, were all substantial exaggerations.

U.S. Fish and Wildlife Service incorrectly stated that many new data supporting listing became available after SKR was listed as a candidate species, when in fact the only data to become available was biological surveys for developments which actually indicated that SKR was more widespread and abundant than previously thought and that the habitat was safer from destruction than previously thought.

U.S. Fish and Wildlife Service relied on the flawed method of only returning to sites where SKR was historically found rather than analyzing the full range of habitat. This method disregarded the known dynamic characteristics of SKR habitat utilization, and a lack of any comprehensive search for new inhabited sites represents a failure to obtain the best scientific information available.

Acreage figures in the proposed rule are questionable based on an example of a major mathematical error. The proposed rule stated that small patches of SKR populations are about 40 acres in size or 100 hectares. One of these numbers is incorrect, in that 40 acres equals about 17 hectares and 100 hectares equals 247 acres. The author divided 100 hectares by the conversion factor of 2.47, rather than multiplying. It appears the author sought to minimize the actual size of small patches,

Continued on Page 5...

U.S. Fish and Wildlife Service falsely stated that it had determined from careful review that SKR should be listed as "endangered," when in fact the decision was an arbitrary determination arrived at in a telephone conversation between (two U.S. Fish and Wildlife Service employees.)

Farm Bureau petitions...

Continued from Front Cover

resources for Farm Bureau and an owner of Golden State Resource Management Group. Since starting to prepare the delisting petition three years ago, Hollingsworth has reviewed more than 20,000 pages of biological information and internal documents obtained from USFWS under a Freedom of Information Act request.

"The conclusions that Stephens' kangaroo rat numbers and habitat were declining and that the kangaroo rat faces extinction were never supported by the best available scientific evidence," Hollingsworth said.

The complete delisting petition is reprinted in this issue and additional copies are available on request from Farm Bureau.

Statement by Bob Perkins, executive manager of Riverside County Farm Bureau:

The listing of the Stephens' kangaroo rat as "endangered" was a fraud, perpetrated on the citizens of Riverside County by the U.S. Fish and Wildlife Service. The Service was given remarkable power under the Endangered Species Act. They abused that power and broke faith with the citizens and Congress that entrusted it to them.

The fraudulent listing of the Stephens' kangaroo rat has undermined efforts to protect species which may be truly threatened. It has also fueled a national effort by farmers and private property owners to reform the Endangered Species Act and rein in the power of the U.S. Fish and Wildlife Service.

Farm Bureau estimates the fraudulent listing of the Stephens' kangaroo rat has cost the economy more than $100 million. The true cost, which may never be known because so much of it is hidden, is more than just the approximately $30 million in mitigation fees collected by Riverside County governments for the unnecessary Stephens' kangaroo rat program. Other costs are:

- Direct costs to private citizens for biological studies and for changes in projects to accommodate restrictions.
- The cost for alternative mitigation such as land donations and conservation easements.
- The lost value of land which is restricted either directly by habitat regulations or indirectly by adjacent habitat lands, a cost which is largely hidden as property owners are unable to sell or use their land.
- The lost economic opportunities for a recession-plagued economy brought to a halt by unnecessary restrictions, where development and jobs have gone elsewhere to avoid Riverside County's problems.
- Higher prices for home buyers and businesses, the end-users who actually pay mitigation fees.
- Higher costs for roads, sewers, pipelines, power lines, schools, and other public projects which also fall into the regulatory quagmire of the Endangered Species Act.
- Higher water rates and standby fees to water users and property owners throughout Southern California to pay the millions of dollars in mitigation done by Metropolitan Water District.
- The increasing taxpayer burden for the cost of local government while habitat plans take more land off the tax rolls.
- The growing opposition to taxes and fees from voters angered by unjustified habitat costs and regulations which faces local governments.

The sad thing is none of these costs were justified, because the Stephens' kangaroo rat never was and never will be in any danger of extinction.

Green?

The Endangered Species Act should be repealed, said more than two-thirds of newspaper readers who responded to an Earth Day phone survey by the San Bernardino County newspaper The Sun. Of 1,122 readers who called in, 69 percent said ESA should be repealed, while just 31 percent said no.

Riverside County
Farm Bureau News

Published by
Riverside County Farm Bureau
Riverside County Farm Bureau is a private, nonprofit organization serving farmers throughout Riverside County since 1917

21160 Box Springs Road, #102
Moreno Valley, California 92557

For information,
Telephone 909/684-6732 or
Fax 909 782-0621.

Printed by Hogar Publishing, Colton, California

Committee hears agreement NCCP isn't working

Very different views on how to fix it

Farming, business, government and environmental representatives have said the state's Natural Communities Conservation Planning program is a good concept that has failed to work as intended

While the various interests generally agreed that the NCCP hasn't been successful and that they would like to see it changed, they disagreed on the direction of change, with farming, business and government wanting less regulation and environmentalists and regulators wanting more regulation

NCCP came under fire from all sides May 18 at an oversight hearing of the state Senate Natural Resources and Assembly Water, Parks and Wildlife Committees

Riverside County Farm Bureau Manager Bob Perkins called for a complete revision of the program to divorce it from all regulatory measures under the Endangered Species Act, to make it entirely voluntary for land owners, and to develop positive incentives for land owners to conserve habitat

He also repeated criticisms of the NCCP which were detailed in 1993 letter from Farm Bureau to Governor Pete Wilson, which was entered into the record of this committee hearing

San Diego County Farm Bureau First Vice President Eric Anderson verified Riverside's criticisms, telling the committees that every problem Riverside predicted has come to pass in San Diego County

Environmental witnesses called for more stringent regulation of land use An Endangered Habitats League spokesman said "A voluntary program alone will not work," a view later repeated by the Natural Resources Defense Council The League spokesman said NCCP agreements should be limited to local governments and not individual land owners.

An Audubon Society representative said the society had refused to enroll its 4,000-acre Orange County ranch in NCCP because doing so would validate the process

Audubon noted that the California gnatcatcher, whose coastal sage scrub habitat is the target of the first NCCP program, does not occupy all of the available habitat. "That's an issue that must be dealt with or there will be a huge backlash "

Senator Tom Hayden, who chaired the hearing, commented that, "Train wrecks over (listing of individual) species might be replaced by train wrecks over (protection of) habitats "

Many of the witnesses mentioned incentives to encourage land owners to conserve or restore habitat Hayden said it "would be helpful to have a full page of those incentives "

Perkins listed nine possible incentives and told Hayden that land owner organizations including Farm Bureau had agreed to develop a more extensive list of incentives He said local governments and individual land owners need a list of incentives from which to chose

In telling the committees that farmers in Riverside County oppose NCCP, Perkins contradicted testimony many of the environmental and regulatory witnesses who said land owners like the program.

Dr Dennis Murphy, director of the Center for Conservation Biology, said if other areas of the state which are considering habitat conservation, looked at the Southern California program, "they would have found it quite attractive " He also said NCCP "could be at its best in areas with more agricultural interests "

Perkins also contradicted the view of environmental representatives on the U S Fish and Wildlife Service 4(d) rule that says California gnatcatcher permits can only be issued within an NCCP Environmentalists said this has been successful and should be the model for future conservation programs Perkins said it was a major mistake by the Service because it makes NCCP regulatory rather than voluntary

A Metropolitan Water District representative said a law providing for ecosystem protection should be offered as an additional alternative to the Endangered Species Act's individual species protection but would need to provide certainty to participating land owners

Editor sees ESA as revenge for wrongs to Indians

Now we find out that the Endangered Species Act is supposed to be the vehicle for righting history's wrongs to the American Indians

That interesting discovery comes from Robert Kahn, city editor for Temecula's The Californian newspaper

In a fascinatingly vitriolic May 1 editorial, Kahn rips the Domenigoni family for "whining" about being stopped from farming 800 acres of their own land

Quoting a 19th century description of how Indians in the Temecula Valley were forced off their land, Kahn implies that the Domenigoni family has no right to complain when the land is taken away from them, by the same federal government With this logic, most of the residents of the United States--that decidedly includes YOU--have no right to their homes and land, and the federal government should be free to take it whenever the government wants.

Apparently it's okay for the Domenigoni family to pay property taxes to the government, but they shouldn't complain when they are stopped from making a living Would Kahn whine too if the government told him he couldn't go to work or earn a paycheck?

Kahn isn't interested in whether the Domenigoni family is being denied its Constitutional right to due process, private property and just compensation. Would he squawk if the government tried to take away his right to freedom of speech and press?

The Manager's Report

By Bob Perkins
Farm Bureau Executive Manager

Property rights gets a voice

Property rights finally got some recognition, as a congressional task force brought hearings on the Endangered Species Act to California and to Riverside.

Farm Bureau members and other property owners held rallies before each ESA Task Force hearing in Riverside, Bakersfield and Stockton to call for sensible changes in the law. They far outnumbered environmentalists who called for an even more regulatory ESA.

Who owns the land?

Environmental extremists don't believe in ownership of private property. They have absolutely no sympathy for land owners whose property is taken through regulation and no understanding of the Constitution's private property protections.

Environmentalist at the ESA Task Force hearings made their views clear. How can any group so thoroughly thumb its collective nose at the Constitution?

Patriots

Environmentalists were offended when Farm Bureau supplied miniature flags to property owners at the Riverside and Stockton property rights rallies. At least one environmentalist picked the wrong person to argue with.

Buttonholing a Riverside resident, the environmentalist asked if all the flags meant property owners thought they were more patriotic than the environmentalists.

"Yes," said the Riverside property owner. He showed the emblem on the back of his jacket, recalling his 35 years of service in the 25th Infantry Division from Pearl Harbor to Vietnam.

"That was your duty," replied the environmentalist.

"Did you do yours?"

"Well, no."

"Case closed."

Thanks for the recognition

A flyer handed out by environmental groups at one of the ESA Task Force hearings complained that "In California, once again, corporate farm groups, building associations and timber interest groups are well represented at the hearings and behind the scenes."

And, they said, the hearings were being held "just where controversy about the ESA is most heated."

Of course. Farmers and property owners think it is time for Congress to listen to farmers, property owners and other victims of ESA. Farm families who turned out for the hearings, exercising those Constitutional rights to free speech and peaceful assembly, can be proud that they helped get their message to Congress.

Intellectually dishonest

One thing was clear at the hearings: environmental leaders are intellectually dishonest, and their movement is doomed to fail unless they face reality. Farmers know the Endangered Species Act is causing tremendous economic and social harm, and it is spending money unnecessarily without helping species that may actually be endangered. Protections for the Stephens' kangaroo rat, California gnatcatcher and, now, the fairy shrimp are costing the California economy hundreds of millions of dollars and none of these species are in any danger of extinction.

The stories told by witnesses at the ESA Task Force hearings about how species are listed followed a similar pattern:

- Listings were proposed with little or no scientific evidence. (For example, the fairy shrimp listing petition was a one-paragraph letter.)

- U.S. Fish and Wildlife Service concealed information and stonewalled requests for the administrative record.

- U.S. Fish and Wildlife Service almost always approved listings, despite overwhelming evidence listing wasn't warranted.

- U.S. Fish and Wildlife Service made no effort to determine the scientific validity of listing proposals.

- Species populations were assumed to be almost extinct before listing, but later proved to be widespread and abundant, justifying restrictions over wide areas and weighing down the local economy with huge new costs.

This is the same pattern which Farm Bureau found as it prepared a petition to delist the Stephens' kangaroo rat.

Attacking the victims

Environmentalists continue seeking to discredit the victims of the 1993 California Fire. They cite a General Accounting Office report as "proof" that k-rat restrictions had nothing to do with the fire.

Not so, said Riverside County Fire Chief Mike Harris at the ESA Task Force hearing in Riverside. He told the panel he couldn't understand how the GAO reached its conclusions. A group of senators and congressmen are calling for a review of the GAO report.

Chief Harris' testimony directly contradicted the GAO report statement that, "Overall, county officials and other fire experts believe that weed abatement by any means would have made little difference in whether or not a home was destroyed in the California Fire." Chief Harris said, "I do not agree" that there was no connection between the restrictions and the fire.

Private studies--and the common sense understanding of farmers and residents in the area--leave no doubt: restrictions imposed at the direction of U.S. Fish and Wildlife Service were major factors in the speed, intensity and extent of the fire.

Endangering species

Listing may be the biggest threat to a species.

Private property owners don't want listed species to spread to their land.

U.S. Fish and Wildlife Service does more harm than good. After prohibiting farming on land near Winchester where k-rats flourished, U.S. Fish and Wildlife allowed brush to build up and fuel the California Fire. U.S. Fish and Wildlife Service then claimed the k-rats were driven out by the heavy brush rather than being burned in the fire.

In Kern County, k-rats were "rescued" from a landfill where they thrived and eventually transported to new habitat (at great expense) where they drowned in a flood.

Restrictions on clearing "habitat" in brush-choked flood channels across the state resulted in floods that wiped out the habitat, resident species, and considerable private property.

Petition...

Continued from Front Cover

substituting 40 acres for the more correct figure of 100 hectares or about 250 acres, thereby exaggerating the threat to the species. It has been proven by current knowledge that the SKR populations are in much, much larger contiguous patches, many are measured in the thousands of acres of contiguous occupied habitat. (RCHCA 10(a) EIR by RECON, Montgomery (Anza, 1992,) O'Farrell (Lake Henshaw, population known at time of listing), RB Riggan (Alessandro Heights survey, 1989.)

U.S. Fish and Wildlife Service misrepresented federal agency response when it stated in its summary of the final rule that federal agencies other than the Air Force indicated no opposition to the listing. In fact, the Air Force was the only federal agency to provide comment on the listing, filing a statement of opposition (see comments, included) U.S Fish and Wildlife Service offered a patently misleading statement in characterizing non-response by other federal agencies as "no opposition."

U.S. Fish and Wildlife Service misrepresented all other comments as "neutral," when in fact comments by the Vista Irrigation District, included herein, could hardly be called neutral, the U.S. Fish and Wildlife Service count breakdown does not make any sense, and other supporting comments aren't itemized in the final rule.

U S Fish and Wildlife Service failed to acknowledge the true situation with regard to the California Department of Fish and Game and the California Endangered Species Act While CDFG submitted comments supporting the SKR listing, U.S Fish and Wildlife Service failed to note or consider the significant fact that CDFG had failed to persuade its own California Fish and Game Commission that SKR was endangered and required upgrading from its state "threatened" status. The Federal Record indicated CDFG provided a copy of a recent status update, yet U.S. Fish and Wildlife Service failed to mention that it got almost all of its SKR information for the listing forwarded to it from just one CDFG employee after the California Fish and Game Commission voted not to upgrade the species to endangered.

U.S. Fish and Wildlife Service failed to note or consider the significant fact that CDFG had failed to persuade its own California Fish and Game Commission that SKR was endangered....

U.S. Fish and Wildlife Service clearly disregarded the importance of definitively delineating the range of the SKR and relied on inadequate and incomplete research U S Fish and Wildlife Service limited consideration to a specific area within the political jurisdiction of Riverside County while disregarding San Diego County and failing to discover SKR in Anza, Aguanga, Oceanside, and the Corona-Norco area Inadequacy of U S Fish and Wildlife Service research information is underscored by expansion of known occupied SKR habitat and population in Riverside County study areas, in Temecula, in Ranchita, (as per Dick Friesen personal communication, 1/93.) U.S. Fish and Wildlife Service based its listing decision on inadequate information about SKR habitat and populations outside its historic range and lack of knowledge of existence of SKR on public and private property. U S Fish and Wildlife Service relied on flawed and inadequate methods for locating SKR outside of historic range, discovering the extent and abundance of SKR only after a development land use activity is planned that requires biological surveys

U S Fish and Wildlife Service selectively used scientific information to support its listing decision and to suppress facts which would have raised doubts about the need to list SKR as endangered. Price and Endo 1988 was cited without reference to the positive aspects of this study, which revealed SKR population could increase tenfold in just one year of high rainfall.

U.S Fish and Wildlife Service again overstated the threat to SKR as occurring rangewide, when this is clearly not the case, and disregarded the large amounts of protected SKR habitat on public lands which were and are safe.

U S Fish and Wildlife Service inaccurately contended that lands held in public ownership were not sufficient to ensure survival of SKR, when in fact U.S. Fish and Wildlife Service had failed to correctly assess the extent of occupied and potential habitat protected on public lands

U.S. Fish and Wildlife Service grossly underestimated the viability of SKR populations on public lands and greatly overestimated the threat to SKR on those lands by implying that SKR habitat needs close monitoring and active management They further implied that because most of the federal agencies using the land had no such active management plan, SKR was therefore imperiled. However, this implication ignored the fact that the land use activity and disturbances characteristic of the mission of the particular federal agencies are likely the very reason SKR is present.

U S Fish and Wildlife Service admitted that the activities of the agencies with occupied SKR habitat are compatible with the species, yet this was never stated in the proposed rule. It is further evidence that the species is more abundant and less threatened than U.S. Fish and Wildlife Service indicated in its proposed rule.

The system of permanent preserves that has been subsequently proposed by Riverside County Habitat Conservation Agency mainly comprises public lands which were already conserved at the time of the listing. RECON, the consultant to RCHCA which has developed much more extensive information about SKR, concluded that public lands are more than enough to sustain the species. Predictions of SKR survival have been based in part on a computer model, the Gilpin Model, which fails to take into account "smart dispersion," the ability of SKR to migrate to suitable new habitat,

U.S. Fish and Wildlife Service selectively used scientific information to support its listing decision and to suppress facts which would have raised doubts about the need to list....

to survive and expand in a habitat environment that historically is in a constant state of change. Both U.S. Fish and Wildlife Service projections and the Gilpin Model are overly pessimistic and contribute to the underestimation of SKR populations and survival and the overstatement of the threat to SKR.

U.S. Fish and Wildlife Service dismissed the issue of compatible land uses because it failed to obtain complete and accurate information about SKR habitat requirements and in fact discarded information about the positive aspects of compatible land uses that was available in the same reports which U.S. Fish and Wildlife Service used in its proposed rule. U.S. Fish and Wildlife Service failed to recognize that land disturbances associated with compatible land uses caused increases in SKR populations. This is demonstrated by the decline in suitable habitat by coastal sage scrub encroachment as a direct result of U.S. Fish and Wildlife Service restrictions on farming, firebreak clearing and other activities.

U.S. Fish and Wildlife Service falsely stated that it had determined from careful review that SKR should be listed as "endangered," when in fact the decision was an arbitrary determination arrived at in a telephone conversation between Karla Kramer, author of the proposed rule, and Ron Novak of the U.S. Fish and Wildlife Service Office of Endangered Species in Washington in which the two individuals discussed whether to propose SKR for listing as "threatened" or "endangered" (phonecon notes, included).

The U.S. Fish and Wildlife Service statement that SKR habitat and range had been greatly reduced is inherently false, because U.S. Fish and Wildlife Service demonstrably lacked complete and available information about the historic range of the SKR and about the current range of the SKR. U.S. Fish and Wildlife Service lacked range information necessary to make comparisons to reach a conclusion that range had been reduced and also failed to investigate reports of habitat (i.e., the Orange County coastline.) "rounded off" occurrences on maps and otherwise disregarded available information which indicated the SKR was more widespread and not under threat.

The statement that 95% of original SKR habitat is gone was incorrect and based on incompatible assumptions for historic and present range.

The range of the SKR was not known at the time of the listing, and it is still not precisely determined. This is amply demonstrated by: discovery of SKR at numerous locations not included within the "historic range" and the corresponding mitigation fee area in Riverside County designated by Riverside County Habitat Conservation Agency, such locations as Anza, Potrero, Diamond Valley, Sage, Tucalota Valley and the Corona-Norco area; requirements for SKR biological surveys at locations outside the previously assumed range, such as at Ontario International Airport in Ontario; local government concerns about getting permits to take SKR outside the previously assumed range, such as Beaumont; and, the plainly observable access to extensive areas of potential habitat adjacent to known SKR populations, such as north and west from Riverside County into San Bernardino County, east into the Banning Pass, and southeast toward Anza-Borrego National Park.

The proposed rule inaccurately described the Stephens' kangaroo rat, in part, as having an ear measurement averaging 15mm. After the listing was finalized, the SKR working group of biologists published a document through U.S. Fish and Wildlife Service intended to aid in differentiation of SKR from PKR, that stated SKR had an ear crown of 13mm or less, and the PKR had measurements of 13mm or greater. A letter dated November 7, 1989, from the field supervisor of the Carlsbad office of the U.S. Fish and Wildlife Service, to an SKR permittee, stated that SKR has a typical ear-crown measurement of less than 12mm, and PKR generally have a measurement of 13mm or greater.

The range was described as being limited to the Perris, San Jacinto Valleys of Riverside County, and the San Luis Rey and Temecula Valleys of San Diego County. (Note that the Temecula Valley was incorrectly described as being in San Diego County.) Subsequent discoveries of the species, both before and after the proposed rule was published, reveal this statement to be not only inaccurate, but also misleading. The proposed rule contradicted this statement later in the text of the rule. At the time the proposed rule was published, the SKR was also known to be present in the Riverside, Lake Mathews, Estelle Mountain, and Sycamore Canyon areas, as well as the Moreno Valley, Canyon Lake, and Lake Skinner areas. U.S. Fish and Wildlife Service was also aware of SKR localities ranging as far north as the Cajon Pass area in San Bernardino County, to Bautista Canyon east of Hemet, in the east, and south to Oceanside. A very large, well-established population that occurs far to the southeast on the Warner Ranch around Lake Henshaw was ignored in the proposed rule. (O'Farrell, 1986.)

Populations of SKR, including those at Anza, Potrero, Aguanga, Tucalota Valley and the Corona-Norco area, have been discovered in areas previously thought unoccupied within the presumed historical range, outside the presumed historical range, and, in well-established populations in areas that are not only far outside the presumed historical range but also in areas and at elevations thought to be uninhabitable for the species. (Montgomery, 1992.)

The proposed rule stated a habitat association of SKR with Artemisia californica and Eriogonium fasciculatum, two brushy plant species characteristic of coastal sage scrub habitats. However, the SKR working group later stated, when discussing habitat of the SKR, "there is a strong correlation between the proportion of annual forbs to annual grasses with the probability of presence or absence of the Stephens' kangaroo rat and the densities found." While this statement is more accurate than the rule, discussing the habitat preference of the species, it is not complete. Current information indicates SKR inhabits a wide variety of vegetation types, native and non-native grasslands, sandy washes and drainages, agricultural fields, disturbed chaparral, dirt roads, and coastal sage scrub.

U.S. Fish and Wildlife Service failed to adhere to the Endangered Species Act because it has failed to initiate a recovery plan for the SKR.

Species range

The known range of the Stephens' kangaroo rat was described as being limited to the Perris and San Jacinto Valleys, and San Luis Rey and Temecula Valleys. This range description cites only four researchers as sources, when many more sources were available to U.S. Fish and Wildlife Service at the time.

A study dated 3 June 1983 by an unknown author, included in the administrative record, helped to create many false impressions and perpetuate factual errors concerning SKR. Two key aspects of this study point to the fallacious logic used to create the argument that the species required Endangered Species Act protection.

The study cited the work previously done on SKR by researchers who attempted to perform "range-wide" status reviews of the species. However, those researchers' studies were often merely re-investigations of historical locations where SKR were found, and seriously lacked in any new investigation or attempts at locating new SKR sites. Therefore, when a particular researcher looked for SKR at a site known to harbor SKR some 20, 30, or 60 years before, and the site had been developed, or for some other unknown reason the species was absent from the site at the time, it was assumed that the species would soon be exturpated from all of its known sites. (Thomas, 1975.) The argument was then made that the species was threatened and later the argument was given greater urgency by saying the species was in imminent danger of extinction, due to the county's growth.

This type of flawed thinking is exemplified in this statement from the introduction to the study. "SKR was the topic of three master's theses in 1973 that involved review of Grinnell's sites (Thomas 1975) and investigation of range limits of rodents (Bleich 1973 & 1974, Bontrager 1973)." Though the introduction does state that, "the Bleich study resulted in the publication of a major range extension for the species (Bleich & Schwartz 1974)," the report does not specify where this discovery was located.

The known range of the Stephens' kangaroo rat has greatly expanded since the publishing of the proposed rule. Information now shows that SKR is endemic to the foothills of the Lake Mathews area, Estelle Mountain, the areas around Lake Skinner and Bachelor Mountain, the foothill areas between Lake Elsinore and the Perris Valley, the Norco Hills and parts of the City of Corona, the Anza Valley, Lake Henshaw and Warner Springs areas of northern San Diego County, and the military bases of Camp Pendleton and the Fallbrook Naval Weapons Station. Recent surveys have shown substantial populations of SKR in the Tucalota Valley, Sage area, and Diamond Valley. These latter discoveries were part of a Section 7 consultation and biological surveys for prescribed burning activity by the California Department of Forestry and Fire Protection.

SKR populations at Camp Pendleton were cited in the final rule without any explanation as to why they were omitted in the proposed rule. Omission of these significant SKR populations on federal lands indicates SKR is more widespread and abundant and the threat to SKR is less than originally stated.

The statement in the final rule that "Vista Irrigation District, MWD, and State of California have large blocks of suitable habitat" was not included in the proposed rule. Omission of these significant masses of protected habitat is another indication that the habitat range and abundance of SKR were understated and the threat to SKR was overstated. The inclusion of new information in the final rule, indicating less threat to SKR, should have caused a reexamination of the need to list.

The Anza Valley discovery is an interesting case for discussion. In 1992 SJM Biological Consultants was commissioned to perform a trapping survey of an approximately 800-acre site of a proposed country club on the Cahuilla Indian Reservation in the Anza Valley. This survey found SKR inhabits at least 400 acres of the site. Montgomery stated, "No attempt was made to determine the distribution of the species throughout the property." (Montgomery, 22 February 92.) However, he also stated in the report, "Although all suitable habitats on the site were not searched for kangaroo rat sign, it is very likely that most or all extant grasslands are occupied by Stephens' kangaroo rats." He estimated 400 acres of grasslands on the site.

Montgomery went on to state in his report that he believed the Anza Valley harbors a large population of SKR. "These results verify that a sizable population of SKR exists in the Anza region, which suggests further that this species occurs elsewhere in this broad valley." (Montgomery, ibid.)

This assumption was confirmed by Montgomery and U.S. Fish and Wildlife Service personnel through subsequent investigation. At the request of U.S. Fish and Wildlife Service, the developer of the country club retained Montgomery to perform a helicopter survey of the entire 70,000-acre valley. Montgomery found suitable habitat and/or evidence of SKR in several locations throughout the valley. Widespread occupation by the species was also confirmed through trapping by Montgomery. According to a map of the area given to the developer by Montgomery after the survey, SKR was confirmed through trapping at areas as widespread as the source of Coyote Canyon in the southeast portion of the valley, to near the Ramona Indian Reservation in the north, and other large areas on the Cahuilla Reservation in the central portion of the valley. The map has written in the margin (presumably by Montgomery,) "Potential SKR habitat is abundant in the area." In all, Montgomery's map (Montgomery, April 92) showed SKR (confirmed through live trapping,) SKR habitat, or suitable SKR habitat fragments on all or parts of 38 sections of land throughout the Anza Valley. This habitat is on Indian lands and private range lands, near

The U.S. Fish and Wildlife Service disregarded the extent of SKR populations on military reservations (and) ...also disregarded the significance of BLM lands... (and) other non-federal public agency lands.

checkerboard BLM ownerships and the San Bernardino National Forest

The subsequent investigation by U.S Fish and Wildlife Service personnel was part and parcel of a Freedom of Information Act request by the petitioner The petitioner was verbally told that U.S Fish and Wildlife Service had surveyed the area, and that "it didn't appear there was that much really out there." (U.S. Fish and Wildlife Service biologist John Bradley personal communication.) U.S Fish and Wildlife Service biologist John Bradley indicated the survey consisted solely of driving and walkovers of the flat river valley only on the Cahuilla Reservation Notes and diagrams of this survey were requested in petitioner's Freedom of Information Act request, but the petitioner was told they did not exist When the petitioner was able to view the SKR file in the U.S Fish and Wildlife Service Carlsbad office, there were notes of a private meeting on the Anza Valley discovery between U.S Fish and Wildlife Service, BLM, Bureau of Indian Affairs, the Riverside County Habitat Conservation Agency, and SKR scientific collection permit holders (including Montgomery) These notes were requested to be included in the materials to be forwarded to the petitioner, but they were never provided to the petitioner by U.S. Fish and Wildlife Service

The species was discovered in 1990 in another location in Riverside County, northwest of the previously defined range Before the discovery of SKR in the Corona and Norco areas, it had not been found north of Highway 91 (Montgomery 29 September 90.) In this study, Montgomery found SKR inhabiting 196 acres of a 235-acre parcel The researcher captured 33 SKR and 14 Pacific kangaroo rats (a non-listed species) at the site, in habitat described as "dense grassland or dense scrub vegetation, on most extremely steep slopes " Montgomery estimated one hillside where SKR were captured at 60% slope This finding is contrary to the proposed rule's statements that SKR only inhabits nearly level to moderate slopes

The proposed rule erroneously cited the habitat as limited to level or low rolling terrain, but both Montgomery and O'Farrell found SKR on slopes up to 100%

The statement in the proposed rule that SKR is confined to low rolling hills and level ridge tops is refuted by current facts of occupation.

Montgomery also speculated in the same study that SKR may exist in the additional undeveloped and relatively undisturbed lands to the north and possibly, the west of this new discovery in Norco

There is further indication that SKR inhabits large areas around Norco. In 1992 U.S. Fish and Wildlife Service biologist John Bradley indicated at an Advisory Committee Meeting of the RCHCA that, "Perhaps the Norco Hills should be added as an additional reserve study area."

Overall, an updated range map does not give a complete picture of the tremendous change in the amount of assumed suitable habitat and also the amount of actual occupied habitat. A more complete picture would show that U.S. Fish and Wildlife Service apparently assumed in 1987 that the habitat suitable for the species was limited to the valley floors of the San Jacinto, Perris, Temecula, and San Luis Rey Valleys and not the entire area contained within the shaded area of the range map An accurate, updated range and occupation/habitat map would include those new areas outlined above, plus areas that were contained in the original map but assumed unsuitable This is evident in the large amount of known occupied habitat in areas that were previously "holes" of thought-to-be unsuitable habitat in the map.

In all, SKR is now known to occur in an area much larger than the 717,000 acres stated in the proposed rule The figure of 717,000 acres was considered by U.S. Fish and Wildlife Service at that time to have been the maximum range historically covered by the species, even before the arrival of European man

Habitat requirements

Habitat of the Stephens' kangaroo rat was incorrectly identified in the proposed rule as limited to "level or low rolling terrain It is not found on extremely hard or sandy soils "

We now know that SKR inhabits annual grasslands, sandy washes, coastal sage scrub to 50% cover, agricultural fields, and a wide variety of soil types including alkaline soils (Montgomery 1989)

The proposed rule disproved its own assumption that SKR do not occupy sandy soils when it stated SKR may be found in "adjoining sandy washes of Southern California "

The proposed rule cited Army Corps of Engineers activities in flood channels "where the species has been found" as a threat to SKR, conflicting with the other statement that SKR does not inhabit sandy soils Sandy soils such as flood control channels were not included in the list of habitats available to SKR

There are numerous surveys, by several biologists, that have shown SKR occupation in such varied habitats as washes and drainages, sandy soils, in alkali soils, and other types of soils

Montgomery, in 1990 in Temecula, O'Farrell, Friesen, and other researchers have found SKR persisting in both hard and sandy soils

The proposed rule stated that gravel was a common component necessary to habitat, but findings of SKR in a range of soils and habitat conditions disprove this

The habitat requirements for SKR are much more varied than the proposed rule made them appear In a report dated April 2, 1992, Dr Michael O'Farrell described an area of SKR occupation that indicates the species' ability to withstand significant impacts from urbanization, agriculture and isolation

In describing the site O'Farrell wrote

"The ca. 104 acre tract is bordered on the north by citrus orchard, on the west by Mockingbird Canyon Road and housing, on the south by Harley John Road and housing, and on the east by Washington Street and housing and was surveyed for occurrence of SKR in April 1989 "

Apparently the occupation of the site was relatively unchanged from the earlier study, as O'Farrell indicated in the report summary where he wrote

SKR was found an average of 27.3 meters or 89.6 feet from rural residential housing.

"Sign of SKR was found over the majority of the site similar to that found in the original survey."

O'Farrell also indicated the site had been heavily impacted by off-road vehicle activity, something which was cited in the proposed rule as a factor threatening the SKR. "Although posted, the site is impacted by off-road vehicle activity which is particularly concentrated in the eastern portion of the site." This does not appear to have had negative affects on SKR because O'Farrell later wrote that, "Sign of SKR was found over most of the project site."

Another O'Farrell study dated 16 July 1989, showed the presence of SKR at a site nearly surrounded by either housing or other thought-to-be-unsuitable habitat and land uses. O'Farrell described the site as follows: "The tract site is bordered on the north by current housing construction and El Nido and El Mineral Roads, by citrus orchards on the east and west, and steep relatively undisturbed hillsides to the south. The entire area is crossed by a network of dirt roads, including the northern extension of Bull Canyon Road directly through the middle of the property. Scattered rural housing is present throughout adjacent lands."

O'Farrell found SKR occupied areas along and adjacent to dirt roads on and adjacent to the site. Further, O'Farrell reported, "A large flat ridge in the western half of the site has been burned in the past. This area is currently occupied in high abundance by SKR. The only thing limiting a more widespread distribution on the site is the current presence of dense shrubs on most of the property."

This passage suggests SKR is able to utilize a variety of habitats in an opportunistic manner, either after disturbances or manipulation by mechanical animal or fire changes. The evidence supporting this is apparent from the surrounding land uses that are thought to be unsuitable for the species. These include the citrus groves, the steep hillsides, and housing. This report and others also indicate the ability for SKR to disperse and colonize new areas through the use of man-made roads and trails. This characteristic of SKR is found repeatedly in reports by various researchers.

The ability for SKR to inhabit and colonize both grazed lands and farmed fields has not only been demonstrated through the increased research attention focused on the species since the federal listing, but was even known at the time of the listing. There is also evidence that U.S. Fish and Wildlife Service personnel working on the listing package knew of the positive effects of grazing on SKR habitat and the ability for SKR to persist in and around agricultural fields, yet the rules proposing and listing the species ignored this data and even implicated grazing as a factor causing its endangerment. This assumption overlooks the U.S. Fish and Wildlife Service surmise that prehistoric herds of deer and antelope (ungulates) provided habitat for SKR as they grazed in the presumed historic range.

A comprehensive study by RECON for the Riverside County Habitat Conservation Agency, published in 1991, focused on the subject of buffer areas for preserves for SKR. In the study, RECON examined five sites for the presence of SKR, all of which had development in close enough proximity to expect impacts on the species.

The researchers attempted to measure the necessary distance to avoid impacts to SKR by measuring the average distance between development and the occupied habitat. The result was that SKR was found an average of 27.3 meters or 89.6 feet from rural residential housing (defined as lots of one-half acre or more in size).

In 1982 Montgomery found that SKR can persist "next to human development indefinitely if the ground remains undisturbed." This statement was in a study, portions of which were used in the proposed rule, yet, this favorable statement to the ability to coexist with development was omitted from the proposed.

In several other surveys, Dr. O'Farrell indicated evidence of the species' ability to persist in small, fragmented habitat patches of linear shape for a period of years. The survey, (O'Farrell 1992, for S.I.C. Corporation) found 17.8 acres of occupied habitat in a linear fashion, bordering a graded housing tract. The site had been surveyed by O'Farrell in 1989 with similar results of occupied acreage, providing evidence of the species' persistence over a period of three years. The survey is evidence of the apparent adaptability of SKR of successfully persisting, even colonizing, small linear patches of habitat. O'Farrell and other researchers performed additional work providing further evidence of this characteristic.

SKR has been found to exist in coastal sage scrub with densities approaching 50% aerial cover. This statement was made in a U.S. Fish and Wildlife Service letter to the U.S. Forest Service regarding the possible presence of the species on National Forest lands. The statement is qualified by explaining that occurrence in coastal sage scrub of high densities is usually when there is a large component of Encelia, or brittlebush, in the habitat. Due to Encelia being deciduous, U.S. Fish and Wildlife Service theorized that the habitat is essentially more open most of the year. This was supported by observation of Montgomery at a site near Riverside in 1990.

Numerous studies indicate SKR is able to successfully inhabit coastal sage scrub of various densities. Montgomery found SKR "to be resident in all open grasslands as well as sage scrub stands ranging from sparse to (in several areas) moderately dense." Subsequent surveys by this biologist found SKR to be present in coastal sage scrub habitat that was "moderately dense." He also observed SKR to inhabit pockets of "denser" sage scrub when it was near open areas or composed largely of Encelia.

Researchers often prematurely dismissed the possibility of SKR presence in various densities of coastal sage scrub even when kangaroo rat sign and burrows were observed. This practice often occurred when SKR presence was documented in open habitats directly adjacent to the coastal sage scrub habitat. Many biologists dismissed the presence of SKR in coastal sage scrub without a

U.S. Fish and Wildlife Service...ignored evidence that SKR immediately reoccupies plowed fields.

confirming trapping effort to positively determine the species of kangaroo rat present. These circumstances have unquestionably led to cases of misidentification of SKR presence as the presence of the non-listed Pacific kangaroo rat when habitat types overlap. An underestimation of the amount of available habitat, and the amount of SKR occupied habitat has occurred throughout the species range.

Population size

U.S. Fish and Wildlife Service obscured and misrepresented the size of habitat needed for a viable population of SKR. According to estimates at the time of the listing proposal, "low" abundance of SKR was less than five individuals per hectare (O'Farrell phonecon notes w/ U.S. Fish and Wildlife Service, 1/28/86.)

The minimum viable population size stated in the final rule would mean that a small patch of 100 hectares occupied in "low" abundance would be characterized as viable. U.S. Fish and Wildlife Service then made a huge extrapolation, not cited as based on any biological information, that, because SKR doesn't use all of its suitable habitat, it would take several square miles to support a more viable population. U.S. Fish and Wildlife Service did not indicate whether it is referring to occupied habitat or suitable habitat. This assumption was purely speculation unsupported by any scientific information.

U.S. Fish and Wildlife Service falsely presented a summary of comments received that failed to report information which had been provided to U.S. Fish and Wildlife Service indicating that SKR was much more widespread and therefore less threatened than U.S. Fish and Wildlife Service indicated. Petitioner found many examples in materials received from U.S. Fish and Wildlife Service under a Freedom of Information Act request showing that U.S. Fish and Wildlife Service had received information about how widespread SKR is but U.S. Fish and Wildlife Service failed to include this information in its summary.

U.S. Fish and Wildlife Service underestimated SKR population densities by ten-to-one.

Population density

The proposed rule cited densities of 20 to 50 SKR per hectare (which would be 8 to 20 SKR per acre,) when studies at Alessandro Heights (RB Riggan, 1989) near the City of Riverside showed densities of over 80 SKR per acre (which would be 198 SKR per hectare.) Thus, densities cited in the proposed rule are about one-tenth of actual known population densities. U.S. Fish and Wildlife Service underestimated SKR population densities by ten-to-one.

The proposed rule stated that "most of occupied range probably has low to moderate density populations." However, this assumption is entirely unsupported and disregards the high densities found in numerous locations, during and following years of normal to high rainfall.

Population densities can fluctuate greatly from year to year depending on amount and timing of rainfall. Research by Mary Price in 1984 on the Motte Reserve showed a tenfold increase in populations of Pacific kangaroo rats (D. agilis) in one year with high rainfall.

Protected populations

In proposing the species for listing, U.S. Fish and Wildlife Service completely ignored SKR populations protected on federal lands at Camp Pendleton and failed to document the number of occupied acres there.

Not only did U.S. Fish and Wildlife Service disregard SKR populations in numerous areas mentioned above, U.S. Fish and Wildlife Service failed to acknowledge protections that were in place in these areas, where habitat is secure from development.

Lake Mathews has been a protected ecological preserve since before the SKR listing, and U.S. Fish and Wildlife Service failed to investigate SKR populations at this Metropolitan Water District land prior to listing. U.S. Fish and Wildlife Service claimed that agricultural and urban development around Lake Mathews and Estelle Mountain caused loss of SKR habitat but failed to document how much habitat was lost, how much remains and how agricultural activity may have benefited SKR.

Lake Mathews is now an SKR reserve study area and is proposed as a permanent core preserve.

U.S. Fish and Wildlife Service was entirely incorrect in its statement that March Air Force Base and Moreno Valley no longer support viable populations. There have been new populations discovered, more than 1,000 acres shown to be occupied and a reserve study area designation on March Air Force Base. Moreno Valley also supports SKR populations, as numerous biological surveys have indicated.

The U.S. Fish and Wildlife Service statement that federal lands form only a small part of the range of the species disregarded the extent of SKR populations on military reservations and the various environmental protection policies of the military services, specifically the Marine Corps at Camp Pendleton, the Navy at Fallbrook Naval Weapons Station, the Air Force at March Air Force Base. Protective policies extend even to nonlisted species, such as the burrowing owl at March Air Force Base. The statement also disregarded the significance of BLM lands (Montgomery 1989.) While discounting the importance of federal lands, U.S. Fish and Wildlife Service also disregarded other non-federal public agency lands such as the State Recreation Area at Lake Perris, the San Jacinto Wildlife Area, Metropolitan Water District land holdings, Vista Irrigation District lands, and lands held by the City of Riverside Parks Department.

U.S. Fish and Wildlife Service was equally incorrect in its statement that the area from Lake Skinner to Temecula has no viable population. Occupied habitat was documented throughout the area. Lake Skinner was designated a reserve study area and enjoyed protection from development. Temecula required more allocation of take under the RCHCA 10(a) permit because of additional population discoveries, and Shipley Ranch is heavily occupied and protected.

The U.S. Fish and Wildlife Service statement in the proposed rule that SKR was not recorded at Lake Perris since 1973 simply underscored the inadequacy of pre-listing surveys which did not look for SKR at Lake Perris or many other locations subsequently found to be occupied. SKR occupied state park lands at Lake Perris and habitat in the nearby

San Jacinto Wildlife Area, both protected areas

U.S. Fish and Wildlife Service overstated the threat to SKR populations around Lake Elsinore, disregarding the protections provided by BLM parcels. The area is characterized by off-road vehicle use, which O'Farrell, Price (1991) and other researchers have shown to be beneficial in disturbing the soil and providing dirt trails to encourage population movement within the habitat.

U.S. Fish and Wildlife Service incorrectly stated that the California Fish and Game Commission listed SKR as "endangered," when in fact the commission voted not to list the species as endangered and indicated that the California Department of Fish and Game did not present enough information to warrant listing SKR as endangered. California had listed SKR as "rare" in 1971, and by virtue of the California Endangered Species Act of 1986, rare designated species were automatically classified as "threatened" with very little new information and no evaluation of the accuracy of information used to support the earlier "rare" designation. SKR remains listed as "threatened" in California.

U.S. Fish and Wildlife Service stated that California Department of Fish and Game consultations under the California Endangered Species Act are inadequate to protect SKR because they result in preservation of lands in another area while allowing "take" of SKR. U.S. Fish and Wildlife Service indicated this is an unacceptable situation for preservation of SKR. However, the Section 10(a) permit of the Riverside County Habitat Conservation Agency results in the same situation, where land is preserved in another location while allowing "take" of SKR.

Reproductive ability

The proposed rule inferred, from statements that pregnant female SKR were found in Spring, that reproduction is restricted to Spring. However, Price (post mortem and 1991 report on reproductive rates after rains,) O'Farrell, and others found that SKR are capable of producing litters year round.

The reproductive ability of SKR was underestimated. The rules published for the species indicated that the species was thought to only reproduce twice each year. Subsequent studies have indicated that the species will reproduce year round and have documented up to five litters per year. The same studies showed information suggesting the frequency and the size of the litters increased with the amount of rainfall in a given year, and with rainfall that occurred later in the year. A necropsy by Dr. Patrick A. Kelley (May 2, 1991) found a female, which died in the course of the trapping, pregnant with five fetuses.

Colonization capability

Populations of SKR were erroneously considered isolated, but there was no basis for assuming this.

In stating that SKR does not occupy all suitable habitat, U.S. Fish and Wildlife Service discounted the fluid characteristics of SKR populations, the fact that SKR populations can recover very quickly, and SKR's persistence in recolonizing previously unoccupied habitat.

A 1984 study by University of California, Riverside, graduate student Narca A. Moore-Craig found SKR recolonizing a field within eight months after agricultural cultivation had ceased.

The Domenigoni family was restricted from using an 800-acre fallow field when SKR occupied it within one or two years (depending on the specific area in the field) after agricultural cultivation had ceased.

The Domenigoni family was also restricted in their cultivation activity on another, leased field. Even though a grain crop had been harvested from the field just five months earlier, SKR were present.

There are numerous other studies showing the colonization capability of SKR in disturbed areas.

Historical habitat

The proposed rule assumed that the historic range of the SKR was 717,000 acres, but this figure was just a guess and excludes "mountain tops," which are not defined. This statement does not allow valid comparisons between historical and present population of SKR because U.S. Fish and Wildlife Service apparently did not exclude non-level terrain from its historical estimate, and then later, when calculating the amount of habitat remaining, U.S. Fish and Wildlife Service did exclude non-level terrain. U.S. Fish and Wildlife Service failed to explain what parameters it used to come up with its figures and failed to apply consistent parameters.

By limiting the soil types identified as suitable for SKR during mapping of suitable soil types, U.S. Fish and Wildlife Service inaccurately extrapolated a historical habitat that was too restrictive, incorrectly illustrating the historical habitat as smaller than it actually is. Numerous examples show that SKR inhabits many more soil types than Price indicated in her soil type study, which was cited in the final rule.

The statement that 95% of original SKR habitat is gone was incorrect and based on incompatible assumptions for historic and present range. The large number was used as historic habitat in order to artificially raise the percentage of habitat gone, which, combined with discounting of present habitat which was incorrectly assumed unsuitable, resulted in overstatement of the threat to the survival of the species. There is no supporting information given to explain or define the "visual" inspection of this former range, if it was by aerial photos, walkovers, or Agricultural Stabilization and Conservation Service or other maps.

Human development and agricultural uses were already present in the early part of this century when the first studies of SKR were done. Dry-land grain farming and grazing were widespread on the valley floors since at least the late 1800s. U.S. Fish and Wildlife Service has failed to reconcile opposing assumptions, that agricultural activities which reduce invasive brush are also offensive to SKR but that SKR are displaced by invasive brush. U.S. Fish and Wildlife Service arguments that SKR thrive in open grassland suggests that grazing and agricultural practices introduced by European man enhanced

U.S. Fish and Wildlife Service obscured and misrepresented the size of habitat needed for a viable population of SKR.

SKR habitat. There is inadequate evidence that great herds of deer and antelope roamed the region's valleys and curtailed brush invasion, as the proposed rule surmised. U.S. Fish and Wildlife Service wants it both ways, that brush is harmful but agricultural activities which remove brush and create habitat are also harmful, ignoring SKR's ability to utilize a wide range of habitats.

U.S. Fish and Wildlife Service referred only to eight general areas where SKR is concentrated, which are (1) March Air Force Base to Moreno Valley, (2) Lake Perris to eastern San Jacinto Valley, (3) Lake Mathews to Estelle Mountain, (4) Lakeview Mountains, (5) Lake Elsinore, (6) Lake Skinner to Temecula, (7) Fallbrook Naval Weapons Station to San Luis Rey River, and (8) Lake Henshaw. This list overlooks other areas where SKR are found, including Corona-Norco, Temescal Canyon, Sycamore Canyon, Alessandro Heights, Potrero Canyon, Steele Peak, Camp Pendleton, Oceanside, Aguanga, Bautista Canyon, Hemet, Murrieta, Winchester, Menifee, and Anza Valley.

The U.S. Fish and Wildlife Service statement that only three of the referenced areas contain substantial amounts of habitat is proven grossly inaccurate by current information, with SKR populations found in abundance in numerous additional areas previously ignored by U.S. Fish and Wildlife Service.

The U.S. Fish and Wildlife Service statement that Lake Henshaw had 12,600 acres of suitable habitat omits the fact that more than 10,000 acres, or nearly all of the acres, is actually occupied (O'Farrell, 1986.)

The U.S. Fish and Wildlife Service statement that SKR was extirpated from 4,940 acres of suitable habitat at Fallbrook Naval Weapons Station and to the San Luis Rey River is not supported. Montgomery (1989, Guajome Park.) indicates SKR are present.

The reproductive ability of SKR was underestimated. (SKR) will reproduce year round and have...up to five litters per year.

Rate of loss of habitat

The proposed rule assumed that present or threatened destruction, modification or curtailment of SKR habitat or range poses a threat to the species, but this cannot be proven or disproven. There is no knowledge of the historical abundance or range of SKR, and the errors that are now apparent with today's information confirm that the SKR's range and abundance in 1987 were greatly underestimated.

Impacts from rural development and agriculture

The ability for SKR to inhabit and colonize both grazed lands and farmed fields has not only been demonstrated through the increased research attention focused on the species since the federal listing, but was even known at the time of the listing. U.S. Fish and Wildlife Service stated that SKR is restricted to insular patches at edges of plowed fields but offered no citation and ignored evidence that SKR immediately reoccupies plowed fields.

U.S. Fish and Wildlife Service is entirely inaccurate in its statement that grazing, off-road vehicle use, and rodent control programs all reduce habitat suitability. Grazing has been well documented to improve the open grassland habitat of SKR and in fact is cited by U.S. Fish and Wildlife Service as the pre-European-man basis for SKR survival. Off-road vehicle use has likewise been shown to promote migration and spread of SKR populations, with SKR documented to travel distances by way of dirt roads and trails, and daytime use of ORV trails has little impact on the nocturnal SKR. Rodent control programs have been reduced and refined to limit the threat to SKR. Rodent poison would have to be used illegally (according to current labeling regulations, independent of the federal Endangered Species Act listing) in most cases to harm the nocturnal SKR.

There is also evidence that U.S. Fish and Wildlife Service personnel working on the listing package knew of the positive effects of grazing on SKR habitat and the ability for SKR to persist in and around agricultural fields. Yet the proposed and final rules ignored this data and even implicated grazing as a factor causing the species' endangerment.

An example of either an unwillingness to look at information objectively, or an indication of complete misunderstanding of the facts as presented, is evident in the following passage from materials in the administrative record:

"An important aspect of SKR habitat is its seral or successional nature. Most SKR sites are open, somewhat disturbed areas. Grazing, past agricultural use or infrequent fires keep the habitat at a state usable by SKR. Succession to denser shrub growth apparently excludes the small mammal from the site. This relationship of SKR habitat with vegetation dynamics may explain the local and shifting nature of SKR populations. Calculation of acres of habitat are, because of this aspect of changing vegetation, rather ephemeral in nature. Also, the management of SKR habitat must address the need to keep the habitat open. The alteration of past management practices which have kept the habitats open might well result in elimination of habitat after a brief period of time."

The telling evidence that U.S. Fish and Wildlife Service personnel ignored or did not understand this crucial bit of information that did not fit their preconceived notion about the pristine habitat requirements of a species is the handwritten word "huh?" appearing in the margin next to the preceding paragraph. The handwriting appears to be consistent with other notes throughout the documents used in the listing package for SKR by the U.S. Fish and Wildlife Service staff person preparing the listing. In any case, there were no references to this passage made in either the proposed or final rule on SKR. There are other, similar notes that reveal this bias on other documents in the listing package.

A bias against any information presented that did not fit the U.S. Fish and Wildlife Service position that SKR should be listed as endangered is also illustrated in another passage contained in the above referenced study:

"Preservation of what appears to be many hundreds of additional acres of potential SKR habitat at Lake Henshaw is fairly well assured since watershed

protection, grazing and SKR habitat preservation are all compatible efforts in this instance." This paragraph had a large question mark next to it and was not included in the proposed rule

Another study by L.F. LaPre indicated the prevalence of misinformation about SKR before the increased scrutiny brought about by the federal listing. In a biological report dated August 31, 1983, LaPre made several comments about the ability for SKR to recolonize disturbed areas

The study focused on a parcel of property, portions of which had recently been disked for agricultural purposes. In a general assessment of the environmental impact of the cultivation, LaPre indicated his opinion that the damage done to the SKR habitat was significant and would require active rehabilitation measures along with years of regrowth and repair LaPre wrote, "In my experience, repopulation of a cultivated area by these rodents requires about ten years."

Later in the same study, he made a statement that is on both sides of the same subject. He stated, "In previously uncultivated areas, signs of kangaroo rats are abundant, whereas there is virtually no chance of occurrence of these rodents on lands plowed within the past five years." This statement contradicts his earlier assertion that it would take ten years for SKR to recolonize the site

The inaccuracy of LaPre's assertion was revealed in a 1984 study by University of California, Riverside, graduate student Narca A. Moore-Craig. Studying a population of SKR on the San Jacinto Wildlife Area near Lake Perris, Moore-Craig found that, among other things, SKR will recolonize an agricultural field in as little as eight months of cessation of cultivation activities

Moore-Craig found that, "Both one stephensi and three agilis were captured on the site, within 8 months after cultivation ceased. The released rats all entered burrows within the disturbed area."

Another case of the ability for SKR to quickly inhabit agricultural fields is illustrated by the Domenigoni family's experience with SKR occupying a fallow field of more than 800 acres within one to two years of cessation of cultivation. U.S. Fish and Wildlife Service restricted the Domenigoni family from farming this property until November 1993, immediately after the devastating California Fire. U.S. Fish and Wildlife Service biologist John Bradley stated SKR had left the field prior to the fire because of the overgrowth of brush and litter, which was a direct result of the U.S. Fish and Wildlife Service restriction on clearing or cultivation.

SKR has also been shown to inhabit grain fields during the crop year. The Domenigoni family also leases property where they were restricted in their cultivation activity on a field that had been harvested only five months earlier. The Domenigoni family was ordered to stop their farming activity because of the presence of SKR within the active grain field.

Statements that SKR were found in abandoned vineyards and citrus groves recently acquired by Riverside County Habitat Conservation Agency have also shown the ability of SKR to inhabit more intensively-farmed agricultural lands.

Encroachment by heavy, weedy undergrowth presents the greatest threat to SKR as a direct result of U.S. Fish and Wildlife Service restrictions on human activities such as agricultural practices and firebreak clearing.

U.S. Fish and Wildlife Service reference to a State Recreation Area rodent control program as a threat to SKR disregarded the opportunity, through government agency cooperation, to manage this program to minimize risk to SKR through a diurnal treatment schedule. The U.S. Fish and Wildlife Service statement suggests that it was purely a guess.

Consultants' observation of the unexplained disappearance of SKR sign and the unsupported hypothesis that this was a result of rodenticides is unsupported, appears on the face of it to be merely a guess, has been shown to be incorrect, and appears to be a weak attempt to convey an over-exaggerated threat to the species. Subsequent research shows the SKR to be dynamic in its habitat utilization, and disappearance of SKR sign without other supporting evidence is inconclusive.

Urban growth patterns

The proposed rule presumed that rapid urbanization in the range has resulted in elimination of entire populations of SKR. However, U.S. Fish and Wildlife Service has failed to show linkage or prove fragmentation. Despite the rapid urbanization, SKR managed to survive and thrive in elongated patches and supporting dirt roads, and they have generally managed to have gene flow over hundreds of generations and years of this supposed isolation since the presence of agricultural development occurred before the turn of the century.

U.S. Fish and Wildlife Service greatly overstated development pressure in the Lake Mathews area when it argued that SKR is likely to be extirpated from the entire area because of planned housing and agricultural development except for the 2,500 acres in the Lake Mathews ecological preserve. In fact, there has been an expansion of SKR and new discoveries of occupied habitat in that area.

U.S. Fish and Wildlife Service concern about infrastructure development is disproven by the experience with the Devers-Serrano power line right-of-way, where populations increased around disturbed areas, and by research by O'Farrell and others showing linear characteristics of SKR populations throughout history.

The proposed rule made several incorrect assumptions regarding loss of populations. It wrongly assumed that, because 78 percent of the sites where SKR had previously been found were now zoned for "incompatible uses," 78 percent of the SKR population would be eliminated. This assumption ignored the fluid characteristic of SKR habitat occupation. U.S. Fish and Wildlife Service assumptions about compatible uses have been disproven.

U.S. Fish and Wildlife Service provided no explanation or definition of compatible and incompatible zoning in the proposed rule.

U.S. Fish and Wildlife Service greatly overstated development pressure....

The U.S. Fish and Wildlife Service assumption that zoning can be changed is an inconclusive proposition. U.S. Fish and Wildlife Service always says protective zoning is not a strong enough indicator of protection of species. By the same argument, land use agencies have been known to "down-zone" lands in sensitive areas, providing increased protection of species.

U.S. Fish and Wildlife Service only cited zoning in Riverside County to support listing even though approximately 50% of the SKR populations (RCHCA short-term 10(a) EIR) were already protected.

The U.S. Fish and Wildlife Service statement that Riverside County's open space zoning is not adequate is unsupported. U.S. Fish and Wildlife Service incorrectly assumed that all human activities are incompatible with SKR when it stated that "only a small fraction of the involved land is currently zoned for uses compatible with the k-rat."

Conclusions

Petitioner disputes the U.S. Fish and Wildlife Service contention that it assessed the best scientific and commercial information available, when in fact U.S. Fish and Wildlife Service omitted numerous specific examples of favorable information, information that subsequently appeared in files made available to petitioner in response to a Freedom of Information Act request. (Friesen, TMC, and O'Farrell, Warner Ranch, and solar facility.)

Petitioner disputes the legitimacy of the U.S. Fish and Wildlife Service decision to list SKR as endangered, based on "phoneon notes" of Karla Kramer, principal author of the proposed rule, and Ron Novak of U.S. Fish and Wildlife Service office of Endangered Species, in which the two persons casually and individually made an arbitrary and unsupported decision to list SKR as endangered rather than threatened.

Petitioner disputes U.S. Fish and Wildlife Service assumption that all human activity is detrimental to SKR, when in fact various human activities have been well documented to be beneficial or to have negligible effects on SKR. These activities include grazing, off-road vehicle use, certain agricultural practices including disking, and some rural development. By assuming all human activity is detrimental, without defining the type of human activity, U.S. Fish and Wildlife Service has overstated the threat to SKR, inaccurately analyzed the history of SKR habitat and failed to demonstrate that SKR population is significantly declining. In fact, restrictions on human activity imposed by U.S. Fish and Wildlife Service have contributed to a decline in suitable habitat.

Petitioner disputes U.S. Fish and Wildlife Service assumptions about the extent of development activity and the threat which development poses, when U.S. Fish and Wildlife Service has disregarded important portions of scientific information available to it and has failed to correctly analyze the impacts of human activity.

Petitioner disputes U.S. Fish and Wildlife Service reasons for not determining critical habitat for SKR, where the issues outlined by U.S. Fish and Wildlife Service have been refuted as not being significant threats. U.S. Fish and Wildlife Service assumed land owner disking would extirpate SKR, when in fact disking has been shown to maintain suitable habitat against coastal sage scrub encroachment and to encourage population expansion. No land owners with SKR-occupied habitat were notified of SKR presence until after suspected Section 9 violations. U.S. Fish and Wildlife Service accepted as fact an unproven hypothesis that rodenticide use was responsible for disappearance of SKR sign in certain areas while disregarding known facts about the dynamics of SKR habitat use and migration.

Petitioner disputes that U.S. Fish and Wildlife Service has adhered to the Endangered Species Act, because U.S. Fish and Wildlife Service has failed to initiate a species recovery plan for SKR.

Petitioner finds that information developed since the original listing shows there were gross errors on the part of the U.S. Fish and Wildlife Service in underestimating the population, range, and persistence of the species.

Petitioner further finds that the U.S. Fish and Wildlife Service erred in exaggerating the threats to the species' existence.

Because of the evidence presented herein, Riverside County Farm Bureau, Inc., submits this petition to delist the Stephens' kangaroo rat under the Endangered Species Act of 1973 and its amendments.

The described range in the proposed rule (to list SKR) was incorrect and incomplete.

Asking for bankruptcy

What almost happened in Desert Hot Springs ought to give some other cities in Riverside County something to think about.

Desert Hot Springs was wondering whether it would be bankrupted by a lawsuit. There are nine cities in western Riverside County that may also be wondering how deep their pockets are.

The issues are different, but the result could be similar.

Desert Hot Springs faced a court decision that could have cost the city up to $6 million. The case still isn't resolved, although the court substantially reduced a $3 million penalty for violation of the federal Fair Housing Act. Interest and other costs would have doubled the penalty, a possibility that had Desert Hot Springs residents talking of bankruptcy or disincorporation. The case could go back for another trial.

The other cities that have reason to worry are the ten western Riverside County cities that joined the Riverside County Habitat Conservation Agency. A lawsuit has been filed by Tom and Janice Morger seeking damages because of property restrictions imposed to protect the Stephens' kangaroo rat. This one lawsuit, for the value of their property, asks for more money than RCHCA currently has in the bank, and there could be more lawsuits coming. It must have occurred to the RCHCA-member cities that they could be stuck with the bill if courts find endangered species restrictions to be improper and RCHCA can't pay. Farm Bureau has repeatedly reminded local governments that k-rat restrictions, from denying grading permits to telling citizens they can't disk firebreaks, are created by local government. The City of Murrieta just joined, in time to part of the pending lawsuit.

The city representatives who sit on the RCHCA board may be much more sensitive to property rights issues in the future.

Biological survey request misleads property owners

Property owners are being mislead about the possible effects of the Coachella Valley Multi-Species Habitat Conservation Plan, which is being developed by the Coachella Valley Association of Governments.

Political Power Intoxicates

By Senator Raymond V. Haynes

Political power intoxicates people, especially bureaucrats. When a man is intoxicated by alcohol, he can recover, by stopping his consumption, but when bureaucratic agencies are intoxicated by political power, they seldom recover without massive curtailment.

Each week a new abuse of political power by an agency comes to my attention, just when I thought government abuse could not infringe any further on property rights.

This time, in the name of the Endangered Species Act, state bureaucrats from the Department of Fish and Game have run amok against the Cameron Baptist Church in El Dorado County. The bureaucrats determined to force the church to spend $45,000 on 10.5 acres of property at $4,500 per acre and deed it over as a "rare plant preserve" or the church would have to set aside a portion of the church five-acre site as a "rare plant preserve." Of course, to set aside property meant the church could not build.

The County Board of Supervisors, in an effort not only to appease the Department of Fish and Game, but also to keep the abuse from impacting small building projects like the church, set aside four plant reserves and charged taxpayers $4.7 million in 1993.

Unfortunately, this was not enough to satisfy the power grab by the bureaucrats of Fish and Game, which sought yet another preserve. The new Cameron Park Baptist Church just happened to be next to an area the bureaucrats wanted as an additional "rare plant preserve."

Cameron Park Baptist Church is now a victim, because the bureaucrats at Fish and Game were intent on obtaining a foothold in the area surrounding the church. The ultimatum by Fish and Game for the land is better described as "government extortion" because without acquiescence to the strong-arm tactics, the church could not complete their construction project.

The church site is not even located on the property the bureaucrats want to take as a "rare plant" preserve, but is some 100 yards away from it. This, of course, still does not prevent the egregious over-reach of Fish and Game bureaucrats. Those who oppose this abuse of power are accused of raping the land and opposing rational environmental regulation.

This is by no means an isolated case of Fish and Game bureaucratic abuse, nor are their actions about the pretext of saving the "endangered flowers" of El Dorado County, it is the unchecked, unrestricted abuse of power by the Department of Fish and Game. It is unconstitutional and in some cases shocking.

This power misuse, as described above, is only one example of the hundreds I am aware of in California. Another example of this unrestricted abuse by the Department of Fish and Game in Murrieta led me to author senate Bill S.B. 4X1 to reign in bureaucrats from the Department of Fish and Game. Private property protection has to mean something in this country if we are going to preserve freedom.

Hidden agendas: Babbitt gets it wrong again

By Bob Perkins
Farm Bureau Executive Manager

In a May 25 statement unintentionally dripping with irony, Interior Secretary Bruce Babbitt charged that Republican spending cuts are a "deliberate assault on the environment" and are "ideology masquerading as a budget."

Babbitt's implication that there is some other purpose to the cuts beyond the need to balance the federal budget echoes past charges from land owner interests that many regulatory programs under Babbitt's authority are assaults on private property rights and are about imposing federal land use controls rather than about conserving endangered species or protecting the environment.

Organizations like Farm Bureau which have defended property rights have long criticized federal regulatory programs such as endangered species restrictions for failing to achieve their intended purposes while harming the economy and taking away basic property rights.

Salton Sea solution could cost billions

Bob Bob Perkins
Farm Bureau Executive Manager

"Saving" the Salton Sea from becoming a dead sea or a dry lake bed could cost more than $2 billion a year.

The problem is very simple. About one million acre-feet of virtually pure water evaporates from the sea every year, leaving behind salt and minerals. The water lost to evaporation is replaced by runoff carrying salts and minerals from the surrounding desert. Without any outlet from the below-sea-level sea, the salt and mineral content continues to collect and concentrate.

Just keeping the sea from becoming any saltier would require purifying one million acre-feet of water per year. Reversing the sea's salinity would require purifying more water per year than is lost to evaporation.

One million acre-feet is almost as much water as Southern California receives each year from the Colorado River Aqueduct. At average wholesale water rates of around $250 an acre-foot in Southern California, the equivalent water cost is at least $250 million a year just to maintain the sea in its present condition. If water purification is undertaken by desalination, at current costs upward of $2,000 an acre-foot, the annual cost to maintain the sea jumps to $2 billion or more.

There are many ways to manage the Salton Sea, including some less costly or less comprehensive alternatives.

One concept is to build dikes and separate areas of the sea, such as around the shoreline, where water quality could be maintained while allowing the bulk of the sea to become a dead sea, water filled with concentrated minerals where nothing can live.

Another concept is to exchange less-salty ocean water from the Gulf of California for Salton Sea water. One version of this idea considers a ship canal using locks to bring commercial sea traffic inland.

Riverside County
Farm Bureau News
Published by Riverside County Farm Bureau, Inc.
A private, nonprofit organization
serving farmers throughout Riverside County since 1917
21160 Box Springs Road, Suite 102
Moreno Valley, California 92557

Santa Margarita Watershed planning resumes

After lengthy discussion among county supervisors and from property owner and environmental groups, the Board of Supervisors decided to resume the Santa Margarita River Watershed planning effort, to designate the county Flood Control District as the lead agency, and to approve a contract for a watershed study.

The contract approval included a proposal by Supervisor Roy Wilson to involve Farm Bureau and Building Industry Association in county agency oversight of contract performance.

Supervisor John Tavaglione was the lone "no" vote against approving the contract, although Supervisor Tom Mullen expressed reservations about funds provided by EPA and about Coastal Conservancy's oversight involvement.

The environmental side almost made the case for rejecting the contract. The Coastal Conservancy acknowledge that $100,000 of a $270,000 grant to pay for the watershed study comes from the EPA and that the conservancy has an interest in seeing that the money is spent the way they want. The conservancy's Prentice Williams said she likes to "take a hands-on approach." Tavaglione said he could not support the contract. Mullen asked why the conservancy couldn't just offer the funds and then step away, leaving the county to supervise the contractor's work on the study.

Mullen said the conservancy's involvement appeared to be "not only oversight but intrusion. For a state agency to operate that way is irresponsible."

Supporting contract approval, a Temecula resident told the supervisors "there's more involved than just the flood control issue." That was a point that property owner groups, including Farm Bureau and the Building Industry Association, also pressed, telling supervisors they feared the study would lead to unwanted land use regulation.

Farm Bureau spoke in opposition both to resuming watershed planning activity and to approving the contract with Coastal Conservancy funding. Acknowledging that the county might go ahead, Farm Bureau recommended delaying the contract approval until after the May 18 meeting of the watershed policy committee and also supported making the Flood Control District the lead agency.

Supervisor Kay Ceniceros defended the planning process, saying no one is being left out and critics aren't presenting accurate information.

Supervisor Bob Buster talked about the need to plan growth. At one point he got into an argument with BIA spokesman Scott Woodward about a development project which Woodward had represented, where the developer later went bankrupt.

Farmers side of endangered species problems told at museum meeting

"Imagine being told you couldn't go to your office or earn a paycheck."

That was how Farm Bureau Manager Bob Perkins explained Andy and Cindy Domenigoni's plight to a non-farm audience at the San Diego Natural History Museum on May 20.

He told the small group of about 20 people how the Domenigoni family was stopped from farming 800 acres of their land.

Perkins was a panelist for the museum's presentation, "Staying Alive! Assessing the Endangered Species Act."

Characterizing the ESA as a complete failure virtually guaranteed to eliminate species and wildlife, R. J. Smith of the Competitive Enterprise Institute in Washington, D.C., gave the panel some controversy to stimulate discussion.

Panelists included Craig Adams of the Sierra Club, Karen Scarborough representing San Diego Mayor Susan Golding, Ed Sauls representing the Building Industry Association, and Michael Beck of the Endangered Habitats League.

"The audience looked like it might lean toward the environmental side of the issue," said Perkins, "but audience members were polite and gracious and seemed genuinely interested in discussing all sides of the subject."

The museum also showed the Nature Conservancy film, "The Coachella Solution," about the fringe-toed lizard preserve. Sauls commented that this conservation effort worked because it had a clearly identified goal and was supported by funding from government and environmental organizations as well as private land owners.

Perkins talked about how habitat conservation is putting undisturbed land off limits, leaving farm land as the only target for new development. He pointed out that the museum's endangered species exhibit included an interactive exhibit saying that, from among a desert, abandoned corn field, wetlands and forest, the corn field is the best place to put a new development.

He also explained suggestions for making Natural Communities Conservation Planning and similar habitat plans voluntary, incentive-based programs, a concept he had offered at the Senate-Assembly hearing on NCCP two days before

DON YOUNG, CHAIRMAN

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

SMUD and the ESA

The Sacramento Municipal Utility District (SMUD) is the nation's fifth largest publicly owned electric utility. It provides service to the greater Sacramento, California area.

SMUD is in the process of developing four cogeneration plants which will provide electrical power for its service area. These projects will replace, in part, electricity which was generated by the now closed Rancho Seco nuclear power plant.

The four plants are located in the Sacramento area at the Procter & Gamble manufacturing facility, the Campbell Soup Company facility, a regional wastewater treatment facility, and an ethanol and power cogeneration plant which is being constructed.

SMUD is constructing a 64 mile natural gas pipeline which will serve each of the cogeneration plants. SMUD was required to complete a lengthy and expensive licensing process with the California Energy Commission (CEC), and pay $100,000 in mitigation fees. It was subsequently required to complete further negotiations with the U. S. Fish and Wildlife Service (USFWS), and spend another $400,000 to set aside 200 acres to mitigate impacts to the "endangered" fairy shrimp.

Pictures one through four show some of the habitat where the fairy shrimp exists along roadways in industrial parks. Picture five shows the tire depressions where this species also exists.

Pictures six through nine show railroad right-of-ways strewn with trash which were also considered habitat. USFWS required SMUD to mitigate this 2/10ths of an acre area.

A total of 25.5 acres was required for mitigation of the areas pictured. However, SMUD was required to set aside a total of 200 acres. The remaining 174.5 acres are to be used for future mitigation of SMUD projects, with no guarantees of mitigation ratios.

Suppose you were forced to pay $250 for a traffic ticket on a trumped up charge, and then the judge ordered you to pay $2,000, of which $1,750 could be applied to possible future traffic violations? You would be dealing with the Fish and Wildlife Service and its abuse of the Endangered Species Act. It's time to restore some common sense to this conservation law.

ATTACHMENTS - FOUR PAGES OF PHOTOGRAPHS

Figure 1 Depression at Procter and Gamble which ponds water in spring *Branchinecta lynchi* located here

Figure 2. Same site as above in summer months. *B lynchi* eggs are abundant at site

Representative sites from SMUD's Procter and Gamble Cogeneration Site and Natural Gas Pipeline

Figure 3 Other depressions at Procter and Gamble which also pond water in spring *Branchinecta lynchi* also identified here

Figure 4. Same site as above in summer months.

Representative sites from SMUD's Procter and Gamble Cogeneration Site and Natural Gas Pipeline

Figure 5. Tire depressions at Procter and Gamble which pond water in spring. *Branchinecta lynchi* also identified at these 4 sites.

Figure 6. Railroad right-of-way where *Lepidurus packardi* and *Linderiella occidentalis* were identified during spring rains.

Representative sites from SMUD's Procter and Gamble Cogeneration Site and Natural Gas Pipeline

Figures 7, 8, 9. The Sacramento Municipal Utilities District (SMUD) was required to set aside 200 acres of land at a cost of $400,000 to mitigate .2 acres (two-tenths of a single acre) of the fairy shrimp habitat pictured.

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

July 17, 1996

Honorable Don Young
Chairman
Committee on Resources
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Young:

At a hearing in late June before your Committee, Congressman Pombo and Congresswoman Chenoweth asked me for information about the position of the United States in the Bennett v. Plenert (now Bennett v. Spear) case, which the United States Supreme Court will review next term. I responded that the government's brief was in preparation and offered to provide interested members with copies once it was filed.

Attached is a copy of the brief the government filed July 15. Its basic thrust is that the plaintiffs in the case did not structure their lawsuit in a way that met either constitutional standing requirements articulated by the Supreme Court or established principles of administrative finality. Most important, they have not sued the federal agency taking the action that they complain of (the Bureau of Reclamation, which operates reservoirs in the Klamath basin), but rather have sued only the federal agency (the Fish & Wildlife Service) which prepared a biological opinion on the impact of reservoir operations on endangered species.

The brief is even-handed in acknowledging that all categories of citizens may obtain review of governmental action concerning protected species, but only if they structure their lawsuit appropriately:

> Decisions made by an action agency in reliance upon a biological opinion may be challenged either by persons asserting an interest in listed species or by persons asserting a competing interest in the resources in question. In either type of suit, a reviewing court may scrutinize the Service's biological opinion and may vacate the action agency's decision if it concludes that the biological opinion is arbitrary and capricious. (Brief, p. 14)
>
> The rule that a biological opinion may be challenged only within the context of a suit against the action agency imposes no special disability upon plaintiffs, like petitioners, who assert an economic interest in the use of

> natural resources. Rather, that rule applies equally to environmental plaintiffs alleging that the opinion is insufficiently protective of listed species. (Id. at 16)
>
> [A]ny actions taken by the Bureau in reliance upon the biological opinion are subject to judicial review at the behest of persons injured by them. Persons whose requests for water are denied as a result of the Bureau's adoption of the Service's recommendations would be appropriate plaintiffs to challenge the BOR's actions. And in the course of reviewing the Bureau's conduct, the court can examine the biological opinion and the evidence on which it was based. In reviewing the scientific judgments embodied in the biological opinion, moreover, the court would employ the same arbitrary-and-capricious standard applicable to suits brought by environmental plaintiffs contending that actions taken in reliance upon a biological opinion were likely to jeopardize listed species. (Id. at 46-47)
>
> Thus, the scientific judgments embodied in a biological opinion may be challenged in court within the context of a suit against an action agency, either by plaintiffs who allege that the opinion is insufficiently protective of listed species, or by plaintiffs who allege that the opinion recommends unreasonably severe constraints on the use of natural resources. The timing and standard of review would be the same in both contexts . . .. (Id. at 47)

Thank you for the opportunity to inform you of the position of the federal government in the Bennett case.

Sincerely,

John D. Leshy
Solicitor

cc: Cong. Pombo
Cong. Chenoweth

No. 95-813

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRAD BENNETT, ET AL., PETITIONERS

v.

MICHAEL SPEAR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

WALTER DELLINGER
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
ANNE S. ALMY
ROBERT L. KLARQUIST
EVELYN S. YING
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217